

COURT OF APPEALS  
DIVISION II

11 FEB -4 AM 11:43

No. 84856-4

STATE OF WASHINGTON  
BY \_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON;

Respondent,

v.

MICHAEL SUBLETT and

CHRISTOPHER OLSEN,

Petitioners.

2011 FEB -8 AM 8:13  
CLERK  
BY RONALD R. CHRISTENSEN

ON DISCRETIONARY REVIEW FROM THE  
COURT OF APPEALS. DIVISION II

Court of Appeals No. 38034-0-II  
(Consolidated with 38104-4-II)  
Thurston County Superior Court No. 07-1-01363-0

ADDENDUM TO SUPPLEMENTAL BRIEF OF RESPONDENT

Jon Tunheim  
Prosecuting Attorney

Carol La Verne  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

**TABLE OF CONTENTS**

A. ISSUE ..... 1

B. ARGUMENT ..... 1

C. CONCLUSION..... 5

**TABLE OF AUTHORITIES**

**U.S. Supreme Court Decisions**

People v. Davis,  
46 Cal. 4th 539, 208 P.3d 78 (2009) ..... 4

People v. Marshall,  
15 Cal. 4th 1, 931 P.2d 262 (1997) ..... 4

**Washington Supreme Court Decisions**

In re the Pers. Restraint of Lavery,  
154 Wn.2d 249, 111 P.3d 837 (2005) ..... 1, 3, 4

State v. Thiefault,  
160 Wn.2d 409, 158 P.3d 580 (2007) ..... 1

**Statutes and Rules**

California Penal Code § 211 ..... 2

California Penal Code § 212.5 ..... 2

RCW 9.94A.030(33)..... 1

RCW 9A.56.190 ..... 2

A. ISSUE.

1. Whether the California statute prohibiting second degree robbery, as it existed in 1994 and 1997, was comparable to Washington's second degree robbery statute.

B. ARGUMENT.

The trial court found that Sublett's convictions in California for second degree robbery—one count in 1994 and two counts in 1997—counted as "strikes" and therefore sentenced him to life in prison pursuant to the Persistent Offender Accountability Act (POAA). RCW 9.94A.030(33). Sublett argued unsuccessfully in the Court of Appeals that the judge's finding was erroneous and that the California statute is not comparable to the Washington statute.

An out of state conviction may not count as a "strike" under the POAA unless the State proves by a preponderance of the evidence that the out of state conviction would constitute a strike in Washington. To make that determination, the court must compare the two statutes. In re the Pers. Restraint of Lavery, 154 Wn.2d 249, 252, 111 P.3d 837 (2005). The trial court's decision is reviewed de novo. State v. Thieffault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

In this case, the State provided to the court the California statutes. The California Penal Code § 211 defines robbery:

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

[Sublett CP 205] California Penal Code § 212.5 identifies second degree burglary as every robbery that is not included in first degree robbery, which is defined in subsections (a) and (b) of that section.

[Sublett CP 207]

In Washington, robbery is defined in RCW 9A.56.190:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

This definition constitutes second degree robbery. RCW 9A.56.210.

When a Washington court conducts a comparability analysis, it uses a two-part test. It first determines whether the elements of

the foreign offense are “substantially similar” to the elements of the Washington offense. Only where the two statutes are not substantially similar does the inquiry broaden into the facts of the foreign offense. Lavery, 154 Wn.2d at 255. “[T]he elements of the charged crime must remain the cornerstone of the comparison.” Id. In this instance, the facts of the California crimes were not admitted, stipulated to, nor proven, and a factual analysis is not possible. See State’s Response Brief at 34.

The State does not dispute that the comparison of statutory elements must include an examination of the mental state required either by the statute or imposed by the appellate courts. In the case of robbery, Washington law requires a specific intent to steal that is not part of the statute. Lavery, 154 Wn.2d at 255-56. In Lavery, the court found that the federal bank robbery statute was not comparable to the Washington second degree robbery statute because Washington requires a specific intent to steal while the federal crime is a general intent crime. Id. The court went on to point out that there are defenses available for a specific intent crime that are not available for a general intent crime. Id., at 256. From this, Sublett argues that the distinction was based on the defenses that might be available under the Washington statute that were not

under the federal law. However, the court was distinguishing between general intent and specific intent crimes, not the defenses that might be available in one jurisdiction but not the other. Robbery is a specific intent crime in both California and Washington. People v. Davis, 46 Cal. 4th 539, 608, 208 P.3d 78 (2009) (“Robbery is the taking of personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property.”); People v. Marshall, 15 Cal. 4th 1, 34, 931 P.2d 262 (1997) (“Robbery is defined as the taking of personal property of some value, however slight, from a person or in the person’s immediate presence by means of force or fear, with the intent to permanently deprive the person of the property.”)

Sublett also argues that the Washington statute requires a threat of immediate force while the California statute does not. The California statute does use the term “force or fear”; it is difficult to envision a situation where a victim would feel fear in the absence of some sort of threat. The only difference is that the California statute did not use the word immediate. However, the requirement for comparability is that the statutes be “substantially similar.”

Lavery, 154 Wn.2d at 255. They do not have to be identical. Statutes will seldom if ever be identical from state to state, and to require such is to make the comparability analysis superfluous.

C. CONCLUSION.

The Court of Appeals correctly held that the Washington and California robbery statutes are "essentially identical." Sublett, 156 Wn. App. at 189. The State respectfully asks this court to affirm the Court of Appeals.

Respectfully submitted this 31 day of February, 2011.



---

Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Addendum to Supplemental Brief, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: DAVID C. PONZOHA, CLERK  
COURT OF APPEALS, DIVISION II  
950 BROADWAY, SUITE 300  
MS-TB-06  
TACOMA, WA 98402-4454

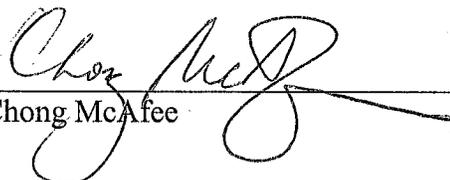
--AND--

JODI R. BACKLUND/MANEK R. MISTRY  
203 4TH AVE. E. SUITE 404  
OLYMPIA, WA 98501-1189  
ATTORNEY FOR CHRISTOPHER OLSEN

JEFFREY ERWIN ELLIS  
LAW OFFICES OF ELLIS, HOLMES & WITCHLEY, PLLC  
705 SECOND AVE., STE. 401  
SEATTLE, WA 98104  
ATTORNEY FOR MICHAEL SUBLETT

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 3rd day of February, 2011, at Olympia, Washington.

  
Chong McAfee