

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 05, 2013, 1:30 pm
BY RONALD R. CARPENTER
CLERK

NO. 85236-7

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEROY JONES,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. FACTS OF THE CRIME	2
3. THE MOTION FOR MISTRIAL	5
4. THE MOTION FOR NEW TRIAL	6
C. <u>ARGUMENT</u>	7
1. THE TRIAL COURT REASONABLY EXERCISED ITS DISCRETION IN CONCLUDING THAT JONES FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL	7
2. THE TRIAL COURT PROPERLY SENTENCED JONES TO LIFE IN PRISON WITHOUT PAROLE AS A PERSISTENT OFFENDER	14
D. <u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Harrington v. Richter, ___ U.S. ___,
131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)..... 10

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 8, 9, 10, 11

Washington State:

Ass'n of Wash. Bus. v. Dep't of Revenue,
155 Wn.2d 430, 120 P.3d 46 (2005)..... 19, 20

City of Seattle v. Holifield, 170 Wn.2d 230,
240 P.3d 1162 (2010)..... 20

In re PRP of Benn, 134 Wn.2d 868,
952 P.2d 116 (1998)..... 9

In re PRP of Crace, 174 Wn.2d 835,
280 P.3d 1102 (2012)..... 8

In re PRP of Lavery, 154 Wn.2d 249,
111 P.3d 837 (2005)..... 16, 17, 18

State v. Berry, 141 Wn.2d 121,
5 P.3d 658 (2000)..... 21

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011)..... 11

State v. Johnson, 173 Wn.2d 895,
270 P.3d 591 (2012)..... 20

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 8, 10

<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	16, 17, 19, 21
<u>State v. Riley</u> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	14
<u>State v. Stockwell</u> , 159 Wn.2d 394, 150 P.3d 82 (2007).....	18, 19
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	18, 20
<u>State v. West</u> , 139 Wn.2d 37, 983 P.2d 617 (1999).....	8, 11

Statutes

Washington State:

RCW 9.94A.030	15, 16
RCW 9.94A.525	16, 22
RCW 9.94A.570	15
RCW 9A.36.021	17
RCW Title 10	21
RCW Title 13	21

Other Jurisdictions:

Fla. Stat. 784.021	17
Fla. Stat. 784.045	17

Rules and Regulations

Washington State:

WPIC 16.04..... 14

Other Authorities

Sentencing Reform Act 15, 21, 22

A ISSUES PRESENTED.

1. A trial court does not abuse its discretion in rejecting an ineffective assistance of counsel claim if the court reasonably concludes that the defendant failed to establish either deficient performance or prejudice. Here, trial counsel was not deficient in failing to contact witnesses that were not helpful to the defense. The trial court reasonably concluded based on the totality of evidence presented at trial that there was no prejudice. Did the trial court properly exercise its discretion in finding that defendant failed to establish ineffective assistance of counsel?

2. An offender is a persistent offender, and must be sentenced to life in prison, if he was previously convicted of two out-of-state convictions whose elements are comparable to a most serious offense in Washington. Jones has two prior Florida convictions whose elements are identical to the crime of assault in the second degree, a most serious offense. Was he properly sentenced to life in prison?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Leroy Jones was convicted by jury trial of the crime of assault in the second degree. CP 893. Before sentencing, trial

counsel withdrew, and newly appointed counsel filed a motion for new trial. CP 82. The trial court denied the motion for new trial. CP 887-91. At sentencing, the trial court found that Jones had previously been convicted in Florida of two crimes that were comparable to most serious offenses. 13RP 24; CP 894. The court imposed a sentence of life imprisonment without possibility of parole. CP 896.

2. FACTS OF THE CRIME.

At 2:30 p.m. on September 10, 2007, four co-workers returning from their daily afternoon coffee break were walking along Fourth Avenue in downtown Seattle when 17-year-old Taurian Alford ran up to the group and stated something to the effect of "he's trying to stab me." 4RP 83-87, 117-19, 135-37; 5RP 7-9. Alford seemed "very agitated," "alarmed," and "frantic." 4RP 89, 137; 5RP 11; 7RP 37. The men were skeptical at first, but within seconds an older male, later identified as Leroy Jones, appeared and attacked Alford. 4RP 90-92, 120, 139; 5RP 13. Jones knocked Alford to the ground, and tried to stab Alford with a knife. 4RP 97-98, 123, 141; 5RP 15. All four men agreed that Alford appeared to be primarily defending himself. 4RP 93, 122, 140; 5RP 16.

As Jones and Alford struggled on the ground, two other young men, T'shaun Bennett and Devin Wilturner, ran up and attempted to help Alford. 4RP 22-23, 35-36, 94, 123, 140; 5RP 17. During the fight, Jones stabbed Alford in the forehead. 4RP 37, 127; 6RP 54. The young men eventually got the better of Jones and pinned him to the ground, hitting him and kicking him at least once. 4RP 37-39, 96-100, 123-26, 142-43; 5RP 19-20. Jones continued to struggle and hold on to the knife until police officers arrived. 6RP 45-48.

Medics treated Alford. 6RP 55. Alford did not testify at trial. The State obtained a material witness warrant for him but was unable to secure his presence for trial. 5RP 56-57. His mother testified that she sent him to Missouri to live with his father after this incident. 5RP 42.

Alford's cousin, T'shaun Bennett, testified at trial that he was with Alford on the day in question. 4RP 22-24. He noticed Alford arguing with Jones on the street. 4RP 26-27. He did not hear the substance of the argument, but shortly thereafter he saw Alford running from Jones, screaming that Jones had a knife. 4RP 29. Bennett saw the knife in Jones' hand as Jones chased Alford down the street. 4RP 30. Bennett and Devin Wilturner joined the chase

and caught up with Alford and Jones on Fourth Avenue, where Jones was on top of Alford and trying to stab him. 4RP 35. Bennett and Wilturner jumped onto Jones' back and struggled with him until the police arrived. 4RP 36-40.

According to the police witnesses, Jones had no visible injuries other than abrasions on his elbow and blood on his lip. 5RP 47. Jones resisted arrest and did not drop the knife until he was tasered by the police. 5RP 47; 6RP 48-50.

Jones did not testify at trial. The defense presented one witness, Mark Forbes, a transportation supervisor who was working at the bus stop next to where the assault occurred. 7RP 64. Forbes testified that he saw two men walking together, who started arguing and then fighting on the ground. 7RP 67-68. Three other men joined the fight and then he heard someone say "he has a knife." 7RP 69. At that point, Forbes noticed a knife cupped in the hand of one of the men and noticed that another man's forehead was bleeding. 7RP 69. According to Forbes, the man with the knife seemed to be protecting himself, although he admitted on cross-examination that it was the other, taller man who appeared to be trying to flee when the fight started. 7RP 73. In closing argument, defense counsel argued that Jones did not assault Alford

with a knife at the beginning of the altercation, and only drew the knife in self-defense after he was being attacked by Alford's friends. 7RP 117-19.

3. THE MOTION FOR MISTRIAL.

At trial, Detective Tim DeVore testified that he took taped statements from three witnesses to the fight, Peter Schwab, Erik Fierce and Lori Brown, on September 13, 2007. 5RP 58. Neither the prosecutor nor defense counsel had copies of these taped statements, although both parties had copies of written statements of Schwab and Fierce taken on the day of the assault. 5RP 61-69. Lori Brown's name and phone number had been provided to the defense. 6RP 10.

Defense counsel moved for a mistrial. 5RP 72. The court denied the motion for mistrial, but granted a brief recess for defense counsel to locate Lori Brown, and to allow Schwab and Fierce to be recalled for further cross-examination. 6RP 29.

Lori Brown, a government employee who observed part of the fight while waiting at the bus stop, was located during the recess and testified as a witness for the State. 7RP 10-11. She testified that she saw a man chasing another man. 7RP 12. The one being chased stopped and "stood his ground" and a fight

ensued. 7RP 13. She testified that she was not watching closely, and did not see any weapons, but did hear someone say something about a knife after more men joined the fight. 7RP 13, 19.

4. THE MOTION FOR NEW TRIAL.

Prior to sentencing, Jones moved for a new trial. In support of his claim of ineffective assistance of counsel, Jones claimed that his attorney was deficient in not locating and calling Michael Hamilton as a witness, and in not interviewing Lori Brown prior to trial. Jones submitted the transcript of a taped interview with Hamilton in support of the motion for a new trial. CP 218-36. Hamilton stated in his interview that he was standing at the bus stop when the assault occurred, and saw two men come around the corner. CP 222. One appeared to be chasing the other, and the older man was being chased. CP 222. The older man was tackled by the younger man. CP 222. The older man had a knife in his hand right after he was tackled by the younger man. CP 223, 226. He saw another man run up and join the fight and then Hamilton boarded a bus. CP 224-25. Hamilton called 911, but was never contacted by the police, the prosecutor or the defense attorney. CP 234.

The trial court found that Jones was not prejudiced by trial counsel's failure to contact Hamilton prior to trial because Hamilton's proposed testimony was not exculpatory and, in fact, contradicted the defense claim at trial that Jones wielded the knife only in self-defense after he was attacked by Alford's friends. CP 889. The trial court concluded that Jones was not prejudiced by trial counsel's failure to contact Brown prior to trial because Brown eventually testified and her testimony did not affect the outcome of the case. CP 888. The trial court did not address whether counsel's performance was deficient. CP 888-89. The court denied the motion for a new trial. CP 891.

C. ARGUMENT.

1. THE TRIAL COURT REASONABLY EXERCISED ITS DISCRETION IN CONCLUDING THAT JONES FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Jones contends that trial counsel was ineffective in failing to contact two witnesses prior to trial. This claim is without merit. The trial court reasonably concluded that Jones failed to establish prejudice. In addition, Jones cannot establish deficient performance.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. A trial court's decision denying a motion for new trial based on a claim of ineffective assistance of counsel will not be reversed absent a manifest abuse of discretion. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different. Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. In re PRP of Crace, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. The United States Supreme Court has warned that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id.

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id. In any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689. Counsel is not required to conduct an exhaustive investigation or to call all possible witnesses. In re PRP of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998).

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must

affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694; McFarland, 127 Wn.2d at 335. The difference between Strickland's prejudice standard and a more-probable-than-not standard is "slight." Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011). Under the Strickland standard, "the likelihood of a different result must be substantial, not just conceivable." Id.

Jones argues that the trial court in this case "usurped" the role of the jury in rejecting his ineffective assistance of counsel claim because a juror "would have been entitled to believe Hamilton and Brown." Amended Petition for Review, at 6. In so arguing, Jones attempts to significantly lower the Strickland standard. Indeed, he argues for the standard that was expressly rejected by the United States Supreme Court: whether an error had some conceivable effect on the outcome of the case. Strickland, 466 U.S. at 693. But this Court has reaffirmed its adherence to the

Strickland standard. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

The trial judge plays a crucial role in evaluating the probable weight of evidence at a hearing to determine whether the defendant has met the Strickland ineffective assistance of counsel standard. West, 139 Wn.2d at 45. The trial judge's determination as to the probable impact of any errors will not be disturbed absent a manifest abuse of discretion. Id. at 42.

It is undisputed that counsel did not contact Michael Hamilton or Lori Brown prior to trial. However, there was nothing in the police reports that would indicate that either of them would be helpful to the defense. Michael Hamilton's name and number was on the 911 dispatch report. CP 216-17. The report reflects that at 2:33 Michael Hamilton called and reported "male with knife is fighting with other people here." CP 216. Lori Brown's name and number was listed as a witness on Officer Tovar's incident report. CP 215. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 690-91. This Court has never adopted a rule that defense counsel must contact every

witness listed in discovery in preparation for trial. Based on the facts presented in this case, there is no basis for concluding that trial counsel was deficient in not contacting these two witnesses.

Moreover, the trial court reasonably concluded that Jones was not prejudiced by counsel's failure to contact Hamilton. To the extent that Hamilton's account placed Jones as the person being tackled, it differed from the other five eyewitnesses to the assault and was not credible. However, Hamilton's testimony would have been extremely detrimental to the key defense claim: that Jones displayed the knife in self-defense only after he was attacked by Alford's friends. As defense counsel represented in his opening statement: the crucial question for the defense was when did the knife come out? 4RP 19. Hamilton repeatedly stated that he saw the older man display the knife as soon as the fight started and *before* the other men joined in, contrary to the defense theory. CP 224, 226. Viewed as a whole, there is no reasonable conclusion that Hamilton's proffered testimony was exculpatory and there is no reasonable probability that it would have changed the outcome of the trial.

Similarly, the trial court correctly concluded that Jones was not prejudiced by counsel's failure to contact Lori Brown prior to trial. Brown's testimony was presented to the jury, and notably did

not affect the outcome of the trial. CP 888, 890. Her testimony was not exculpatory and largely comported with the other witnesses that one man had first chased another and a fight started. 7RP 11-13. Brown's testimony did not strongly support the key defense claim that Jones only pulled a knife in self-defense after the other men joined the fight. Brown testified that she never saw a knife at all and only heard a statement about a knife one to four minutes into the fight. 7RP 19, 22, 26. Significantly, she testified that she was not watching the fight closely and looked away when she used her cell phone to call for help. 7RP 13, 18. The trial court reasonably concluded that there is no reasonable probability that contacting Brown prior to trial would have changed the outcome of the trial.

Hamilton's and Brown's testimony must be judged within the context of the whole trial. Significantly, two of the State's witnesses, Enre Veka and Erik Fierce, testified that they did not notice the knife in the defendant's hand until after the victim's friends arrived and intervened, as noted in the defense closing argument. 4RP 97, 123, 133; 7RP 107. However, both of these witnesses heard the victim say something to the effect of "he's trying to stab me" before the defendant tackled the victim, and thus

their testimony as a whole supported the testimony of the other witnesses that Jones brandished the knife as he chased the victim down. Moreover, even if the jury had a reasonable doubt as to whether Jones brandished the knife before the victim's friends joined the melee, under Washington law a person who provokes an altercation cannot claim the right of self-defense unless he in good faith first withdraws from the combat at a time and in a manner to let the other person know that he is withdrawing. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).¹

Given the totality of the facts, the trial court reasonably concluded that Jones failed to establish ineffective assistance of counsel in regard to counsel's failure to investigate and present witnesses Hamilton and Brown. There is no reason to disturb that determination on appeal. The trial court did not abuse its discretion in denying the motion for new trial based on this claim.

2. THE TRIAL COURT PROPERLY SENTENCED JONES TO LIFE IN PRISON WITHOUT PAROLE AS A PERSISTENT OFFENDER.

Jones contends that his Florida prior convictions for aggravated battery and aggravated assault are not comparable to the most serious offense of assault in the second degree, despite

¹ The aggressor instruction, WPIC 16.04, was properly given in this case and has not been challenged on review. CP 72.

the fact that the elements are identical. This claim must be rejected. This Court has repeatedly held that if the elements of an out-of-state conviction are identical to a most serious offense in Washington, the out-of-state conviction constitutes a strike. Jones' claim that the trial court must also examine the criminal jurisprudence of the other jurisdiction and determine what defenses were available has been rejected by this Court, runs counter to the plain language of the Sentencing Reform Act ("SRA") and would make sentencing hearings so cumbersome that it would render comparability analysis completely unworkable.

Pursuant to RCW 9.94A.030(33), a persistent offender is an offender who has been convicted of a most serious offense and has been previously convicted on two separate occasions of "most serious offenses." A persistent offender must be sentenced to life without the possibility of release. RCW 9.94A.570. Assault in the second degree is a most serious offense. RCW 9.94A.030(29)(b).

Throughout the SRA, the legislature has manifested its intent that out-of-state convictions be included in a defendant's criminal history and in the persistent offender determination. RCW 9.94A.030(12) explicitly defines "criminal history" as being the defendant's prior convictions, "whether in this state, federal court,

or elsewhere.” RCW 9.94A.030(33) defines a “persistent offender” as one who was previously convicted of two most serious offenses, “whether in this state or elsewhere.” RCW 9.94A.030(29)(u) defines “most serious offenses” as including “any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense.” The legislature obviously intended sentencing courts to include out-of-state convictions when making sentencing calculations, including persistent offender findings. State v. Morley, 134 Wn.2d 588, 597, 952 P.2d 167 (1998).

RCW 9.94A.525(3) provides that: “Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” To determine whether an out-of-state conviction is comparable, the court must look to the elements of the crime and compare them to the elements of the Washington crime. Morley, 134 Wn.2d at 605. The elements of the crime are the “cornerstone” of the comparison. Id. at 606. If the elements of the out-of-state conviction are comparable to the elements of a Washington offense “on their face,” the out-of-state conviction is included in the offender score and no further analysis is required. In re PRP of Lavery, 154

Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable to a most serious offense, then the out-of-state conviction constitutes a strike. Morley, 134 Wn.2d at 613-14.

Jones does not dispute that certified documents presented by the State proved the existence of his 1988 Florida conviction for aggravated assault pursuant to Fla. Stat. 784.021(1)(b), and his 1991 Florida conviction for aggravated battery pursuant to Fla. Stat. 784.045(1)(a)(2). CP 951, 956. Jones pled guilty in both cases. CP 956, 998. Fla. Stat. 784.021(1)(b), in effect in 1988, defines aggravated assault as "an assault with an intent to commit a felony." See Appendix A. Fla. Stat. 784.045(1)(a)(2), in effect in 1991, defines aggravated battery as "a person commits aggravated battery who, in committing battery uses a deadly weapon." See Appendix B.

Both crimes are comparable to the Washington crime of assault in the second degree. In Washington, RCW 9A.36.021(1)(c) and (e) define assault in the second degree as follows: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree, . . . (c) assaults another with a deadly weapon; or . . . (e) with intent to commit a felony, assaults another." Thus, both the

1988 and 1991 prior convictions are comparable to the most serious offense of assault in the second degree.

Nonetheless, Jones argues that the Florida offenses cannot be comparable to assault in the second degree, despite the identical elements, because diminished capacity is not an available defense in Florida. Jones relies on dicta from In re PRP of Lavery, supra, and State v. Stockwell, 159 Wn.2d 394, 150 P.3d 82 (2007), for this proposition. Jones is mistaken; the holdings of those cases do not support his argument. Moreover, the dicta that Jones relies on was rejected by this Court in State v. Sublett, 176 Wn.2d 58, 86-89, 292 P.3d 715 (2012).

In Lavery, this Court held that federal bank robbery is not comparable to Washington's robbery in the second degree because federal bank robbery is a general intent crime and robbery in the second degree requires intent to steal. Lavery, 154 Wn.2d at 255-56. This Court concluded that "because the *elements* of federal bank robbery and robbery under Washington's criminal statutes are not substantially similar, we conclude that federal bank robbery and second degree robbery in Washington are not legally comparable." Id. at 256 (emphasis added). In discussing the difference between general intent and specific intent crimes, this

Court noted the availability of certain defenses for the latter. Id. at 256. However, this Court reaffirmed its prior holding that “if the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense.” Id. at 255 (citing Morley, 134 Wn.2d at 606).

Two years later, in State v. Stockwell, this Court addressed the question of whether a prior Washington statutory rape conviction is comparable to the current crime of rape of a child. 159 Wn.2d at 397. This Court concluded that the elements of the two crimes are comparable. Id. at 399. In so holding, this Court reiterated its long-standing rule that “if the elements of the strike offense and the elements of the foreign (or prior) crime are comparable, the former (or prior) crime is a strike offense.” Id. at 397. However, the opinion then contradicted its own holding in dictum: “where there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction or at the time, the elements may not be legally comparable.” Id. Statements in an opinion that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed. Ass’n of Wash.

Bus. v. Dep't of Revenue, 155 Wn.2d 430, 442 n.11, 120 P.3d 46 (2005). The sentence relied on by Jones was not necessary to decide Stockwell, is dictum, and need not be followed. See State v. Johnson, 173 Wn.2d 895, 904, 270 P.3d 591 (2012) (holding statement in opinion that was unnecessary to resolve the case was nonbinding dictum); City of Seattle v. Holifield, 170 Wn.2d 230, 243, 240 P.3d 1162 (2010) (holding discussion that was not necessary to decide the case was dicta).

Recently, in State v. Sublett, this Court held that the defendant's prior California convictions for second degree robbery were comparable to Washington convictions for second degree robbery because both statutes required a specific intent to steal. 176 Wn.2d at 729-30. However, Sublett argued that the California convictions were not comparable because "Washington law recognizes defenses to robbery that California does not." Id. at 730. This Court rejected that argument, stating "[t]he focus of the comparability inquiry remains on the elements of the crimes, not the defenses." Id.

Jones' contention that the trial court must take into consideration all possible defenses available in the foreign jurisdiction in conducting a comparability analysis is contrary to this

Court's holdings that the legislature did not intend that comparability analysis be an overly cumbersome and complicated process. In State v. Morley, this Court held that the Sentencing Reform Act cannot be read in a way that would exclude every out-of-state conviction from a defendant's criminal history. 134 Wn.2d at 598. In that case, the defense argued that in order to constitute a conviction, an adjudication of guilt must be "pursuant to Titles 10 and 13 RCW." This Court rejected the claim, holding that "the application of Title 10 to out-of-state convictions would effectively result in all out-of-state convictions being excluded from consideration under the SRA." Morley, 134 Wn.2d at 598. Similarly, Jones' claim that the State must prove not only that an out-of-state conviction's elements are the same, but that the other state's substantive criminal law provides all the same defenses, would likely result in very few out-of-state convictions being included in a defendant's criminal history.

Similarly, in State v. Berry, this Court stated "that expanding the comparability analysis beyond an elemental analysis would unnecessarily complicate an already difficult process." 141 Wn.2d 121, 132, 5 P.3d 658 (2000). Jones' claim would create the type of complicated process that the court rejected in Berry, by requiring

inquiry into mental defenses such as insanity and diminished capacity, as well as the laws of defense of self and others, necessity, duress, entrapment and consent. Sentencing hearings would become all-day hearings exploring the criminal jurisprudence of other states to insure that there were no defenses available in Washington that were unavailable in the other state. Under Jones' reasoning, if there was any variation between the jurisprudence of the other state and Washington, then the out-of-state conviction could not be included in the defendant's criminal history.

Most importantly, Jones' claim is contrary to the plain language of the SRA. As stated above, RCW 9.94A.525(3) provides that "[o]ut-of-state convictions for offenses shall be classified according to the *comparable offense definitions* and sentences provided by Washington law." (Emphasis added). On its plain terms, comparability analysis is limited to the definition of the crime. There is no support in the language of the statute for Jones' claim that there must also be identical defenses in order for an out-of-state conviction to be comparable pursuant to RCW 9.94A.525(3).

The record demonstrates that the elements of the two prior Florida crimes that Jones pled guilty to are identical to the elements

of assault in the second degree. No further analysis is required.
The trial court properly sentenced Jones as a persistent offender.

D. CONCLUSION.

The Court of Appeals decision affirming Jones' conviction
and sentence should be affirmed.

DATED this 4th day of June, 2013.

Respectfully submitted,

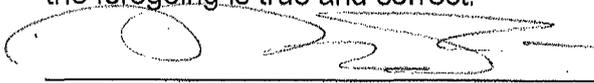
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Brief of Respondent, in STATE V. JONES, Cause No. 85236-7, in the Supreme Court of the State of Washington.

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



Name
Done in Seattle, Washington

06/05/13
Date