

65715-1

65715-1

REC'D

JUN 24 2011

King County Prosecutor
Appellate Unit

NO. 65715-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEVON D. LAIRD,

Appellant.

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

The Honorable Cheryl B. Carey, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

2011 JUN 24 PM 4:07

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE TRIAL COURT ERRED BY COUNTING LAIRD'S PRIOR TENNESSEE CONVICTION AS A THIRD "STRIKE" AND IMPOSING A PERSISTENT OFFENDER SENTENCE.....	1
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Seattle v. McCready</u> 123 Wn.2d 260, 868 P.2d 134 (1994).....	5
<u>Hatley v. Saberhagen Holdings, Inc.</u> 118 Wn. App. 485, 76 P.3d 255 (2003).....	6
<u>In re Personal Restraint of Carter</u> 154 Wn. App. 907, 230 P.3d 181 <u>review granted</u> , 170 Wn.2d 1001 (2010)	3
<u>In re Personal Restraint of Lavery</u> 154 Wn.2d 249, 111 P.3d 837 (2005).....	1, 2, 3, 4, 7
<u>State v. Jordan</u> 158 Wn. App. 297, 241 P.3d 464 (2010).....	1, 2, 3, 4, 5, 6
<u>State v. Leach</u> 113 Wn.2d 735, 782 P.2d 1035 (1989).....	6
<u>State v. Lucero</u> 168 Wn.2d 785, 230 P.3d 165 (2010).....	5
<u>State v. Morley</u> 134 Wn.2d 588, 952 P.2d 167 (1998).....	4
<u>State v. Stockwell</u> 159 Wn.2d 394, 150 P.3d 82 (2007).....	4
<u>State v. Sublett</u> No. 84856-4	1
<u>State v. Thomas</u> 135 Wn. App. 474, 144 P.3d 1178 (2006).....	6
<u>State v. Valdez</u> 167 Wn.2d 761, 224 P.3d 751 (2009).....	5

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.525 3

A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED BY COUNTING LAIRD'S PRIOR TENNESSEE CONVICTION AS A THIRD "STRIKE" AND IMPOSING A PERSISTENT OFFENDER SENTENCE.

Laird contends the trial court erred by finding his Tennessee conviction for assault with intent to commit second degree murder was comparable to a Washington conviction for second degree assault because the diminished capacity defense was not available at the time Laird pleaded guilty to the offense.¹ Brief of Appellant at 17-24. In response, the state urges this Court to follow State v. Jordan,² where this Court held the availability of defenses is not a factor in determining the comparability of out-of-state convictions. 158 Wn. App. at 303-04.

To reach that result, this Court narrowly read In re Personal Restraint of Lavery³ as holding only that federal bank robbery and first degree robbery in Washington were not comparable because Washington

¹ The Tennessee statute at issue, assault with intent to commit a felony, is attached as an appendix. Laird also has a Tennessee conviction for assault with intent to rob with a deadly weapon. A copy of the pertinent statute is attached in the same appendix. Because both crimes require specific intent, the same argument regarding diminished capacity applies to both convictions.

² 158 Wn. App. 297, 241 P.3d 464 (2010). Consideration of Jordan's petition for review has been stayed pending the Supreme Court's decision in State v. Sublett, No. 84856-4.

³ 154 Wn.2d 249, 111 P.3d 837 (2005).

required the specific intent to steal, while federal bank robbery was a general intent crime. Jordan, 158 Wn. App. at 302. In other words, the crimes were not comparable solely because they had different elements. Id.

The pertinent language in Lavery follows:

The crime of federal bank robbery is a general intent crime. The crime of second degree robbery in Washington, however, requires specific intent to steal as an essential, nonstatutory element. Its definition is therefore narrower than the federal crime's definition. Thus, a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington. Among the defenses that have been recognized by Washington courts in robbery cases which may not be available to a general intent crime are (1) intoxication, (2) diminished capacity, (3) duress, (4) insanity, and (5) claim of right. 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.

154 Wn.2d at 255-56.

The Jordan Court held Lavery referred to available defenses only to "illustrate the practical differences between the two elements." Jordan, 158 Wn. App. at 302. Jordan held a broader reading, like's Laird's interpretation, would unduly burden sentencing courts by requiring them to examine the criminal jurisprudence of other states to determine whether there were defenses available in Washington that were unavailable in the state of conviction. Jordan, 158 Wn. App. at 303. Such an exercise is

contrary to RCW 9.94A.525(3), according to Jordan, which provides that "[o]ut-of-state convictions for offenses shall be classified according to the *comparable offense definitions and sentences provided by Washington law.*" Jordan, 158 Wn. App. at 303.

Laird respectfully disagrees with Jordan's dismissive treatment of Lavery's reference to defenses that may be available to Washington defendants but not to those in a foreign state. There was no reason for the Lavery court to refer to the defenses merely to "illustrate" the practical differences between general and specific intent because those differences are obvious. Rather than being merely illustrative, the availability of defenses "narrows" a crime's definition:

The Washington definition thus was narrower than the federal crime's definition. A person could be convicted of federal bank robbery without being guilty of second degree robbery in Washington because of the defenses that would be available only to a specific intent crime, including the defense of intoxication. Lavery, 154 Wn.2d at 256, 111 P.3d 837.

In re Personal Restraint of Carter, 154 Wn. App. 907, 923, 230 P.3d 181, review granted, 170 Wn.2d 1001 (2010).

Because the concomitant consequence of different mental state elements may be the availability of defenses, which in turn narrows the scope of the statute requiring specific intent, the possibility of defenses should thus be considered part and parcel of the mens rea element itself.

In other words, when Washington's specific intent requirement necessarily animates several defenses that are categorically unavailable under a foreign general intent requirement, the crimes cannot be said to be comparable under the "elements" test.⁴

Laird's case is only slightly different than Jordan. While the pertinent Tennessee and Washington offenses had the same mens rea element (specific intent), the diminished capacity defense did not exist when Laird committed his Tennessee crimes. Brief of Appellant at 19-23. As a result, Laird could not pursue a diminished capacity defense in Tennessee under any circumstances. Laird's bottom line, therefore, is the same as if he had been convicted of a general intent crime: Washington's crime at issue had a narrower scope than did Tennessee's. See State v. Stockwell, 159 Wn.2d 394, 397, 150 P.3d 82 (2007) ("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.").

⁴ To ascertain whether an out-of-state crime of conviction is comparable for sentencing purposes to a Washington felony crime, courts must first compare the elements of the foreign crime to those of the Washington crime. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If an out-of-state statute prohibits a broader range of conduct than the Washington counterpart, the state must show the offenses are factually comparable. Lavery, 154 Wn.2d at 255.

This is an important difference in crimes and one the Jordan Court effectively dismisses, primarily out of a concern for sentencing expediency. See Jordan, 158 Wn. App. at 303 ("Jordan's argument would require Washington sentencing courts to examine the jurisprudence of the state of conviction to ensure there were no defenses available here that were unavailable there.").

In other contexts, Washington courts have condemned reliance on expediency to justify short cuts in legal analysis or procedure. See State v. Lucero, 168 Wn.2d 785, 788, 230 P.3d 165 (2010) (reversing this Court's rebuke of Division 2 decision that held defendant's failure to object to counting of Oregon conviction in offender score did not constitute affirmative acknowledgement; this Court held Division 2 decision was "contrary to the most basic principles of judicial economy"). See also State v. Valdez, 167 Wn.2d 761, 776, 224 P.3d 751 (2009) (discussing searches of vehicles incident to arrest, court explains that "[i]t is not the place of the judiciary . . . to weigh constitutional liberties against arguments of public interest or state expediency."); City of Seattle v. McCready, 123 Wn.2d 260, 281, 868 P.2d 134 (1994) (holding "inspection warrants" used to implement Seattle's Residential Inspection Housing Program must be quashed, court observed, "We are sensitive to these concerns, but in the final analysis our decision must be governed by

the enduring mandate of our state fundamental law and not by the fluctuating demands of present expediency."); State v. Leach, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989) (regarding "common authority" rule, court held, "However, should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent. Any other rule exalts [*sic*] expediency over an individual's Fourth Amendment guarantees."); Hatley v. Saberhagen Holdings, Inc., 118 Wn. App. 485, 490, 76 P.3d 255 (2003) (reversing trial court's decision to change venue, court held, "We recognize that Pierce and King Counties are neighboring counties and that under a different set of facts, the ends of justice might warrant transfer. But here the trial court looked to expediency and efficiency, rather than well-settled statutory and case law standards.").

The Jordan Court's reasoning falls into the same expediency trap. This Court should reject Jordan and the state's argument based on the case.

There is a second reason why the availability of a defense is an important consideration. Where a particular defense is unavailable in a foreign state, the accused has no incentive to mount such a defense. State v. Thomas, 135 Wn. App. 474, 487, 144 P.3d 1178 (2006) (recognizing the lack of incentive to mount a defense in the foreign state as important in the comparability analysis), review denied, 161 Wn.2d 1009 (2007).

This may effectively short-circuit the "factual" examination of the comparability analysis. Lavery, 154 Wn.2d at 257.

For these reasons, Laird urges this Court to reject the state's argument because it relies on Jordan's unsound analysis. This Court should vacate Laird's sentence of life in prison without parole and remand for resentencing.

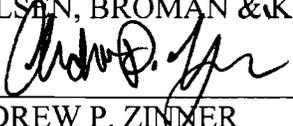
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Laird requests this Court to find the trial court erred by counting his Tennessee conviction as a "strike" for persistent offender sentencing purposes. This Court should vacate Laird's sentencing and remand for resentencing.

DATED this 24 day of June, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZIMMER
WSBA No. 18631
Office ID No. 91051

APPENDIX

39-2-102. Assault with intent to commit felony. — If any person assault another, with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five thousand dollars (\$5,000). [Code 1858, § 4630; Shan., § 6471; Code 1932, § 10801; Acts 1982 (Adj. S.), ch. 804, § 1; T.C.A. (orig. ed.), § 39-603.]

Cross-References. Assault with intent to commit rape or sexual battery, § 39-2-608.

Assault with intent to kidnap, § 39-2-301.

Attempt to commit felony, § 39-1-501.

Jury providing punishment for less than one year, § 40-21-107.

Textbooks. The General Sessions Court (Hall), § 239.

Law Reviews. A Critical Survey of Developments in Tennessee Family Law in 1976-77, VIII. Child Abuse (Neil P. Cohen), 45 Tenn. L. Rev. 493.

Criminal Law and Procedure — 1960 Tennessee Survey (Robert E. Kendrick), 13 Vand. L. Rev. 1059.

Criminal Law and Procedure — 1963 Tennessee Survey (Robert E. Kendrick), 17 Vand. L. Rev. 977.

Criminal Law and Procedure — 1964 Tennessee Survey (Graham Parkes and Robert E. Kendrick), 18 Vand. L. Rev. 1131.

Criminal Law in Tennessee in 1969 — A Critical Survey (Joseph G. Cook), 37 Tenn. L. Rev. 433.

Criminal Law in Tennessee in 1977-1978, II.

Offenses (Joseph G. Cook), 46 Tenn. L. Rev. 474.

Criminal Law in Tennessee in 1979 — A Critical Survey, II. Offenses (Joseph G. Cook), 48 Tenn. L. Rev. 3.

Instructing the Jury on the Defense of Voluntary Intoxication in Tennessee, 39 Tenn. L. Rev. 479.

Cited: Boulton v. State, 214 Tenn. 94, 377 S.W.2d 936 (1964); United States v. Yarbrough, 352 F.2d 491 (6th Cir. 1965); Judkins v. State, 224 Tenn. 587, 458 S.W.2d 801 (1970); Levasseur v. State, 3 Tenn. Crim. App. 513, 464 S.W.2d 315 (1970); Jones v. State, 477 S.W.2d 227 (Tenn. Crim. App. 1971); Phillips v. State, 480 S.W.2d 361 (Tenn. Crim. App. 1972); State v. Hughes, 512 S.W.2d 552 (Tenn. 1974); Petree v. State, 530 S.W.2d 90 (Tenn. Crim. App. 1975); Harrell v. State, 593 S.W.2d 664 (Tenn. Crim. App. 1979); State v. Livingston, 607 S.W.2d 489 (Tenn. Crim. App. 1980); State v. Lee, 618 S.W.2d 320 (Tenn. Crim. App. 1981); State v. Merriweather, 625 S.W.2d 256 (Tenn. 1981); State v. Smith, 627 S.W.2d 356 (Tenn. 1982).

NOTES TO DECISIONS

ANALYSIS

1. Intent.
2. Specific felonies.
3. —Manslaughter.
4. —Second degree murder.
5. —Malicious shooting.
6. —Rape.
7. Indictment.
8. —Charging offense.
9. —Including lesser offense.
10. —Particularity.
11. Defenses.
12. —Intoxication.
13. —Protection of persons.
14. Conviction of lesser offense.
15. Punishment.
16. Verdict.

1. Intent.

The element of intent may be proved by circumstantial evidence. In fact, instances are rare indeed when intent can be proved by direct evidence; it must nearly always be shown by circumstantial evidence. *Randolph v. State*, 570 S.W.2d 869 (Tenn. Crim. App. 1978).

2. Specific Felonies.

3. —Manslaughter.

An indictment for an assault with intent to commit manslaughter is good under this section. *State v. Williams*, 64 Tenn. 655 (1875).

Where there was evidence to the effect that after defendant and second party argued, defendant went into house from porch, got a gun, returned and shot second party, evidence sustained conviction of assault with intent to commit voluntary manslaughter. *Hawkins v. State*, 213 Tenn. 712, 378 S.W.2d 777 (1964).

[SEE TABLE IN FRONT OF THIS VOLUME FOR CHANGES IN SECTION NUMBERING]

that issue shifts to the state. *Graham v. State*, 547 S.W.2d 531 (Tenn. 1977).
The M'Naghten Rule concerning the defense

of insanity is abandoned and is replaced by the American Law Institute Rule. *Graham v. State*, 547 S.W.2d 531 (Tenn. 1977).

39-2-104. Assault with intent to rob. — (a) Whoever shall assault another, with intent feloniously and willfully to commit a robbery, shall, on conviction, be imprisoned in the penitentiary not less than three (3) years nor more than fifteen (15) years. If the assault is committed by means of a deadly weapon, whether injury results to the person assaulted or not, the penalty on conviction shall be imprisonment in the penitentiary for not less than five (5) years nor more than twenty-one (21) years.

(b) Provided however, that if the person assaulted is included within any one (1) or more of the categories listed below, the jury may fix the length of imprisonment, upon conviction, at not less than the minimum nor more than double the maximum length of time provided by this section:

(1) Sixty-five (65) years of age or older;

(2) A permanent physical or mental impairment, disease or loss which substantially precludes a person from reasonably defending himself; and

(3) A person having not more than ten (10) per centum visual acuity in the better eye with correction, to wit, a person who has either:

(A) Not more than 20/200 central visual acuity in the better eye after correction; or

(B) An equally disabling loss of the visual field such as a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than twenty (20) degrees.

[Code 1858, § 4627 (deriv. Acts 1829, ch. 23, § 54); Shan., § 6468; Code 1932, § 10798; Acts 1968 (Adj. S.), ch. 607, § 1; 1977, ch. 68, § 1; T.C.A. (orig. ed.), § 39-607.]

Cross-References. Robbery, § 39-2-501 et seq.

Law Reviews. Criminal Law in Tennessee in 1969 — A Critical Survey (Joseph G. Cook), 37 Tenn. L. Rev. 433.

Criminal Law in Tennessee in 1977-1978, II.

Offenses (Joseph G. Cook), 46 Tenn. L. Rev. 474.

Cited: *Burns v. State*, 591 S.W.2d 780 (Tenn. Crim. App. 1979); *Harrell v. State*, 593 S.W.2d 664 (Tenn. Crim. App. 1979).

NOTES TO DECISIONS

ANALYSIS

1. Elements of offense.
2. Multiple offenses.
3. Lesser included offense.
4. —Instructions.
5. Sentence.

1. Elements of Offense.

Assault with intent to rob must be actual and personal, coupled with a felonious intent, and the besetting of a house is only a constructive assault and not an actual one. *State v. Freels*, 22 Tenn. 228 (1842); *Hammond v. State*, 43

Tenn. 129 (1866); *Cooley v. State*, 88 Tenn. 250, 14 S.W. 556 (1889).

2. Multiple Offenses.

Offense of assault with intent to commit robbery by means of a deadly weapon and offense of carrying pistol for purpose of going armed are separate and distinct offenses, even though stemming from one criminal episode; and conviction for one does not necessarily bar conviction for the other. *Cole v. State*, 539 S.W.2d 46 (Tenn. Crim. App. 1976).

Where both charges arose from the same criminal episode, the offense of employing a