IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NELSON GEOVANY HERNANDEZ, Appellant.	No. 45656-7-II UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. JASON ANTHONY DELACRUZ, Appellant.	(Consolidated with No. 45723-7-II)

JOHANSON, C.J. — Jason A. Delacruz and Nelson G. Hernandez appeal their consecutive sentences for theft of a firearm. They primarily argue that the trial court exceeded this court's mandate on remand when it resentenced them to consecutive sentences on two counts of theft of a firearm. In a statement of additional grounds (SAG), Delacruz argues that there is insufficient evidence to support his conviction for first degree unlawful possession of a firearm and that his offender score is incorrect. Because we remanded for resentencing, we conclude that the trial court

did not exceed its authority and because Delacruz provides an insufficient record to enable us to decide the SAG issues, we affirm.

FACTS

I. BACKGROUND FACTS AND FIRST TRIAL

Delacruz and Hernandez were among a group of individuals who, over a two-day period, burglarized three homes. Among the items they stole were firearms, electronics, and sports paraphernalia.

A jury convicted Delacruz and Hernandez on 11 counts each, including two counts of theft of a firearm,[1] one count of possession of a stolen firearm (count XIII),[2] and one count of unlawful possession of a firearm (count XVII).[3] On count XVII, Delacruz was charged with first degree unlawful possession of a firearm based on a prior California conviction for first degree burglary.[4] The original sentencing court ordered only one of the two theft of a firearm convictions, the convictions for possession of a stolen firearm, and the convictions for unlawful possession of a firearm to run consecutively to each other and for all other counts to run concurrently.

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[1] RCW 9A.56.300.

[2] RCW 9A.56.310.

[3] Former RCW 9.41.040 (2005).

[4] CAL. PENAL CODE § 460. We assume that Delacruz's first degree unlawful possession of a firearm conviction was based on the trial court's determination that his prior first degree burglary conviction in California was a "serious offense" that elevated second degree unlawful possession of a firearm to a first degree offense. Although Delacruz argues in his SAG that his California conviction is what elevated his unlawful possession of a firearm conviction to a first degree offense, this fact is not clear from the record.

Delacruz and Hernandez appealed. *State v. Hernandez*, 172 Wn. App. 537, 290 P.3d 1052 (2012), *review denied*, 177 Wn.2d 1022 (2013). The State conceded that the convictions for one count of theft of a firearm should merge with one count of possession of a stolen firearm. In the published portion of the opinion we held that we "accept[ed] the State's concession, vacate[d] those convictions, and remand[ed] for resentencing." *Hernandez*, 172 Wn. App. at 539. We also said later in the unpublished portion of the opinion that we "accept the State's concession and we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft. . . . We remand for resentencing regarding those counts." *Hernandez*, No. 41707-3-II, slip op. at 9.

II. RESENTENCING HEARINGS

In December 2013, Delacruz and Hernandez were resentenced. At the resentencing hearings, the trial court vacated Delacruz's and Hernandez's convictions for possession of a stolen firearm. The State argued for the first time that under RCW 9.94A.589(1)(c), Delacruz's and Hernandez's convictions for two counts of theft of a firearm must run consecutively to each other and to their convictions for unlawful possession of a firearm. Delacruz argued that "it is clear that the Court can resentence" on his theft of a firearm conviction but that the resentencing court had discretion not to resentence on all counts if it chooses. Delacruz Report of Proceedings (RP) (Dec. 20, 2013) at 15. Hernandez agreed with the State, arguing that under the statute, it was proper for both theft of a firearm sentences to run consecutively. Delacruz and Hernandez both asked for sentences at the low end of the standard range.

The resentencing court relied on (1) the "language at the outset of [this court's] opinion," Delacruz RP (Dec. 20, 2013) at 19, on appeal where we "accept[ed] the State's concession,

vacate[d] those convictions [for possession of a stolen firearm], and remand[ed] for resentencing," *Hernandez*, 172 Wn. App. at 539, and (2) the fact that "[c]ounsel are both acknowledging that it's within my discretion to resentence or not" and agreed with the State, ordering that Delacruz's and Hernandez's sentences for theft of a firearm run consecutively to each other and to their sentences for unlawful possession of a firearm. Delacruz RP (Dec. 20, 2013) at 19. Both defendants were resentenced to the same total months of confinement that they received at their first sentencing. Delacruz and Hernandez appeal their sentences.

ANALYSIS

I. THE TRIAL COURT'S AUTHORITY TO RESENTENCE ON REMAND

Delacruz and Hernandez argue that the trial court exceeded its sentencing authority on remand.[5] The State argues that this court's mandate was a broad mandate to conduct any proceedings necessary to "lawfully resentence" the defendants.[6] Br. of Resp't at 7. Because we remanded for resentencing, we hold that the sentencing court did not err by ordering that both theft of a firearm convictions sentences must run consecutively.

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[5] Delacruz and Hernandez also argue that the trial court abused its discretion when it refused to consider imposing exceptional sentences below the standard range. Although a defendant is entitled to request an exceptional sentence below the standard range and a sentencing court abuses its discretion when it "'refuses categorically to impose an exceptional sentence below the standard range under any circumstances,'" *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)), neither Delacruz nor Hernandez requested an exceptional sentence below the standard range. Therefore, the trial court did not abuse its discretion.

[6] The State also argues that Delacruz's and Hernandez's sentences are not appealable because the resentencing court sentenced the defendants to standard range sentences, acted within its mandate from this court, and properly determined that RCW 9.94A.589(1)(c) requires consecutive sentences. Because we rule in favor of the State, we need not address its additional arguments.

A. STANDARD OF REVIEW AND RULES OF LAW

"The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate." *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). When our opinion states that we only "remand for resentencing," the resentencing court has broad discretion to resentence on all counts. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) ("Toney's sentence was not final because our remand did not limit the trial court to making a ministerial correction. Rather, we unequivocally 'remand[ed] for resentencing.'" (quoting *State v. Toney*, noted at 95 Wn. App. 1031, 1999 WL 294615, at *1)).

RCW 9.94A.589(1)(c) provides,

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, . . . [t]he offender *shall serve consecutive sentences* for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(Emphasis added.)

Delacruz and Hernandez rely on the remand language in our prior opinion to support their claim that the resentencing court exceeded its authority. They argue that we remanded with "specific instructions" and that our mandate must be "strictly followed." Br. of Appellant Delacruz at 1; Br. of Appellant Hernandez at 5. The State argues that our remand language gave the resentencing court broad discretion to resentence Delacruz and Hernandez "lawfully." Br. of Resp't at 7. We conclude that the trial court acted within its authority because we remanded for resentencing.

In the first appeal, we specifically "held" that we "accept[ed] the State's concession, vacate[d] those [possession of a stolen firearm] convictions, and remand[ed] for resentencing."

Hernandez, 172 Wn. App. at 539. This statement suggests that we intended to give the resentencing court broad authority to conduct a new sentencing hearing. *Toney*, 149 Wn. App. at 792. Later in the opinion, we stated that we "accept the State's concession and we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft. . . . We remand for resentencing regarding those counts." *Hernandez*, slip op. at 9. For a second time we remanded for resentencing. But in contrast to this opinion's earlier statement, this excerpt suggests that we intended to limit the resentencing court's mandate only to the theft of the firearm conviction that was the subject of Delacruz's and Hernandez's first appeals. When we look at this opinion's conflicting language, we are persuaded to rely on the language contained in our specific holding. And that holding remanded for resentencing. Thus, the trial court followed our broad remand to conduct a resentencing.

II. Statement of Additional Grounds

Insufficiency of the Record For Factual Comparability Analysis

In a SAG, Delacruz makes two additional arguments. Both arguments fail due to lack of a sufficient record for our review.

1. Sufficiency of the Evidence For First Degree Unlawful Possession of a Firearm

First, Delacruz argues that the evidence is insufficient to support his conviction on one count of first degree unlawful possession of a firearm. Specifically, he argues that the State never proved that he had committed a prior, "serious offense" based on his California first degree

burglary conviction.[7] We do not address this argument on the merits because the record is inadequate to determine the merits of this claim.

It is the burden of the party presenting an issue for our review on appeal to provide a record sufficient to establish the alleged error. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (citing RAP 9.2(b)). We may decline to review an alleged error "'when faced with a material omission in the record.'" *Sisouvanh*, 175 Wn.2d at 619 (quoting *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999)).

We review a challenge to the sufficiency of the evidence at trial to determine whether, when "'viewed in the light most favorable to the prosecution, [the evidence] permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.'" *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). A defendant commits first degree unlawful possession of a firearm when he "owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense." Former RCW 9.41.040(1)(a). A "serious offense" is defined by a list of offenses including "[a]ny crime of violence" and "any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious offense." Former RCW 9.41.010(12)(a), (o) (2001). The definition of a "crime of violence" includes second degree burglary, residential burglary, and second degree robbery. Former RCW 9.41.010(11)(a) (2001). Thus, we must decide whether Delacruz's

[7] Delacruz does not explicitly identify the comparability of his California burglary conviction as the error at issue. But based on his statements about "the comparability of the defendants [sic] out-of-state convictions" and the fact that a California burglary conviction is the only out-of-state conviction on his judgment and sentence, we presume that the California burglary conviction is the subject of his SAG. SAG at 3.

California first degree burglary conviction is comparable to a Washington conviction for second degree burglary or residential burglary.

Whether an out-of-state conviction is comparable to a Washington conviction is a question of law that we review de novo. *State v. Werneth*, 147 Wn. App. 549, 552, 197 P.3d 1195 (2008). When doing a comparability analysis of an out-of-state conviction, we apply a two-part test. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). We must first compare the elements of the out-of-state conviction with a similar Washington offense to determine if the offenses are "legally comparable." *State v. Olsen*, 180 Wn.2d 468, 472-73, 325 P.3d 187, *cert. denied*, 135 S. Ct. 287 (2014). Where the foreign offense is broader than the Washington offense, the two statutes are not legally comparable and we must determine whether they are factually comparable. *Olsen*, 180 Wn.2d at 473. A factual comparability analysis requires this court to ask "whether the defendant's conduct would have violated the comparable Washington statute." *Olsen*, 180 Wn.2d at 473.

In Washington, a defendant commits second degree burglary when he or she, "with intent to commit a crime against a person or property therein, . . . enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). A defendant commits residential burglary, similarly, when he "with intent to commit a crime against a person or property therein, . . . enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1).

In California, "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." CAL. PENAL CODE § 459. In California, a burglary is elevated to first degree burglary when it is of an "inhabited" dwelling or vessel. CAL. PENAL CODE § 460.

Considering the elements of these offenses, California's definition of burglary is not legally comparable to Washington's because it covers conduct that would not violate Washington's second degree and residential burglary statutes. In California, a person is guilty of burglary whether he entered and remained in the subject building, dwelling, or space either lawfully *or* unlawfully. CAL. PENAL CODE § 459. In contrast, Washington's second degree and residential burglary statutes explicitly require a person to enter or remain in the subject space *un*lawfully. RCW 9A.52.030(1), .025(1). A person who *lawfully* enters or remains in a space with intent to commit a crime commits a burglary in California but does not commit a burglary in Washington.

Division One of this court agreed with this analysis in *State v. Thomas*, 135 Wn. App. 474, 483, 144 P.3d 1178 (2006), where it accepted the State's concession that California's burglary statute is broader than Washington's because it does not require unlawful entry or remaining. We conclude, as Division One did in *Thomas*, that because California's definition of burglary covers lawful as well as unlawful entry and remaining, it covers more conduct than Washington's burglary statutes and is, thus, not legally comparable. Therefore, we must turn to factual comparability analysis.

When performing a factual comparability analysis, we may consider the "defendant's conduct, as evidenced by the indictment or information" as well as other evidence that was admitted or proven beyond a reasonable doubt in the out-of-state proceeding. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 258, 111 P.3d 837 (2005).

But Delacruz has not provided any record from his trial here or from his California conviction to permit this court to conduct a factual comparability analysis to determine whether his conduct in violating California's first degree burglary statute would violate a comparable

Washington statute. Nor can this court review the factual question of whether sufficient evidence existed from which a rational jury could have found the essential elements of first degree unlawful possession of a firearm. Therefore, we decline to consider this alleged error because Delacruz has not met his burden to provide sufficient record on appeal.

2. OFFENDER SCORE

Second, Delacruz argues that his sentence is improper because his California conviction for first degree burglary is not comparable to a similar Washington offense and, thus, may not be used to increase his offender score. For the same reasons discussed above, we also decline to address this argument because Delacruz has not presented sufficient evidence upon which we can conduct a factual comparability analysis of his out-of-state conviction.

We review the trial court's calculation of a defendant's offender score de novo. *Olsen*, 180 Wn.2d at 472. An illegal or erroneous offender score may be raised for the first time on appeal. *State v. Rice*, 159 Wn. App. 545, 571, 246 P.3d 234 (2011), *aff'd on other grounds*, 174 Wn.2d 884, 279 P.3d 849 (2012). The sentencing court may increase a defendant's offender score for an out-of-state conviction if the State meets its burden to show that the out-of-state conviction is "comparable" to a similar Washington offense. RCW 9.94A.525(3); *Olsen*, 180 Wn.2d at 472.

As discussed earlier, California's burglary statute is not legally comparable to Washington's. The next test is factual comparability. But Delacruz has not provided the indictment or information from his California conviction nor has he provided any evidence or documentation from which we can determine whether his conduct in that case would have violated Washington's burglary statute. Therefore, we decline to consider on the merits his argument about his offender score.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Melnick, J.
MELNICK, J.