IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PEDRO F. GARCIA MORALES, Appellant.	No. 39415-4-II UNPUBLISHED OPINION

Armstrong, J. — Pedro Morales appeals his sentence, arguing that his prior California assault conviction is not comparable to a "most serious offense" in Washington under the Persistent Offender Accountability Act (POAA), chapter 9.94A RCW, and that the finding of his prior convictions by a preponderance of the evidence violated his rights to a jury trial, due process, and equal protection under the law. Because Morales's foreign conviction is not comparable to a most serious offense in Washington, we vacate his sentence and remand for resentencing.

FACTS

A jury convicted Morales of first degree assault, RCW 9A.36.011(1)(a). At sentencing, the trial court considered two convictions in determining whether Morales should be sentenced as a persistent offender: (1) a 1997 California conviction for assault with a deadly weapon and (2) a

Washington conviction for second degree assault. The court found the California conviction comparable to second degree assault under Washington law. Accordingly, the court sentenced Morales as a persistent offender to life without the possibility of parole.

ANALYSIS

I. Comparability of Foreign Conviction

Morales argues that the trial court erred in ruling that his California assault with a deadly weapon conviction is a "strike" under the POAA because the California conviction is neither legally nor factually comparable to second degree assault in Washington.

Under the POAA, a defendant already convicted of two "most serious offenses" must be sentenced to life without parole upon conviction for a third such offense. RCW 9.94A.030(36), .570. Second degree assault is a most serious offense or "strike" for purposes of the POAA. RCW 9.94A.030(31)(b). Foreign convictions constitute strikes if they are comparable to Washington's most serious offenses. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 252, 111 P.3d 837 (2005). We review de novo a sentencing court's decision to consider a prior conviction as a strike. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

A foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. *Lavery*, 154 Wn.2d at 255-58. A foreign offense is legally comparable if "the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Thiefault*, 160 Wn.2d at 415. If the elements of the two statutes are not identical or if the foreign statute is broader than the Washington definition of the particular crime, the trial court must then determine whether the offense is factually comparable. *State v. Morley*, 134 Wn.2d

588, 606, 952 P.2d 167 (1998). A conviction is factually comparable where the defendant's conduct would have violated a comparable Washington statute. *Lavery*, 154 Wn.2d at 255.

A. Legal Comparability

Morales argues that assault with a deadly weapon in California is not legally comparable to second degree assault in Washington because (1) assault in California does not require specific intent to inflict injury; (2) the California assault statute at issue has an alternative means of committing the crime not found in the second degree assault statute in Washington[1]; and (3) California does not permit diminished capacity or intoxication as a defense to assault.

In California, a person is guilty of assault under California Penal Code section 245, if he commits an assault on a person with a deadly weapon. Cal. Penal Code § 245(a)(1). Assault is statutorily defined as an "unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240. It requires only the general intent to willfully commit an act, the direct, natural, and probable consequence of which, if completed, would be the injury to another. *People v. Colantuono*, 7 Cal.4th 206, 214, 26 Cal.Rptr.2d 908, 865 P.2d 704 (1994). Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. *Colantuono*, 7 Cal.4th at 214; *see also People v. Rocha*, 3 Cal.3d 893, 899, 92 Cal.Rptr. 172, 479 P.2d 372 (1971) (assault with a deadly weapon is a general intent crime).

In Washington, a person is guilty of second degree assault when he assaults another with a

[1] Under the California Penal Code section 245(a)(1), a person is guilty if he assaults another with a deadly weapon or by any means of force likely to produce great bodily injury. Although Morales was charged under both alternatives, he pleaded guilty to assault with a deadly weapon. Thus, we proceed by comparing the assault with a deadly weapon alternative to second degree assault in Washington.

deadly weapon. RCW 9A.36.021(c). Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent;[2] and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm. *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006). Specific intent to either create apprehension of bodily harm or cause bodily harm is an essential element of second degree assault in Washington. *In re Pers. Restraint of Carter*, 154 Wn. App. 907, 922, 230 P.3d 181 (2010); *See also State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

Several Washington decisions have held that California assault convictions are legally comparable to first or second degree assault in Washington and thus count as strike offenses. *See e.g.*, *State v. Wheeler*, 145 Wn.2d 116, 119, 34 P.3d 799 (2001) (conviction of assault with a firearm in California is equivalent to assault with a deadly weapon in Washington). But as we recently noted in *Carter*, none of these cases discuss the fact that assault in California is a general intent crime while assault in Washington requires proof of specific intent. *Carter*, 154 Wn. App. at 922. Addressing that particular issue, we found that the defendant's California assault on a police officer with a firearm was not legally comparable to second degree assault in Washington because of the different intent elements. *Carter*, 154 Wn. App. at 924.

In doing so, we relied primarily on *Lavery* for the proposition that a foreign conviction is

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[2] Although assault in Washington can be either an actual battery or attempted battery, an assault in California encompasses the attempt only. *Compare* Cal. Penal Code § 240 ("[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another") *with* Cal. Penal Code § 242 ("[a] battery is any willful and unlawful use of force or violence upon the person of another"). As Morales was convicted of assault in California and not a battery, this definition of assault in Washington is inapposite.

not legally comparable where the foreign crime is a general intent crime and the Washington crime requires specific intent. *Carter*, 154 Wn. App. at 923; *see also Lavery*, 154 Wn.2d at 255-56. There, the issue was whether Lavery's federal conviction for bank robbery was comparable to the Washington crime of second degree robbery and counted as a strike under the POAA. *Lavery*, 154 Wn.2d at 254. The court held that the two offenses were not legally comparable because the crime of federal bank robbery is a general intent crime and the crime of second degree robbery in Washington requires specific intent to steal. *Lavery*, 154 Wn.2d at 255-56. Given that Washington's definition of robbery is narrower than the federal crime's definition, the court reasoned a person could be convicted of federal bank robbery without being guilty of second degree robbery in Washington. *Lavery*, 154 Wn.2d at 256. The court also noted that defenses available to a defendant in Washington robbery cases, such as intoxication and diminished capacity, may not be available to a general intent crime. *Lavery*, 154 Wn.2d at 256. The court concluded that federal bank robbery and robbery in Washington are not legally comparable. *Lavery*, 154 Wn.2d at 256.

As in *Carter*, the *Lavery* rationale applies in this case. It is possible that a defendant could be guilty of assault in California without being guilty of assault in Washington. We hold that assault with a deadly weapon in California is not legally comparable to second degree assault in Washington because of the different intent elements.

B. Factual Comparability

Morales argues that his California plea agreement does not establish the specific intent element of second degree assault in Washington. He also argues that the probation report,

submitted by the State at sentencing, does not contain facts that the sentencing court was entitled to rely on.

If the elements of the foreign conviction are different from or broader than the elements of the parallel crime in Washington, the court must determine whether the underlying facts, necessarily proved beyond a reasonable doubt or expressly admitted by the defendant, make the offense comparable. *See Lavery*, 154 Wn.2d at 256-58 (holding that although *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), does not require that prior convictions be proved beyond a reasonable doubt, the rule in *Apprendi* does not apply to foreign crimes that are not facially identical to Washington offenses); *see also Thiefault*, 160 Wn.2d at 416 n.2 (noting that although the State offered to produce evidence describing the defendant's conduct, none of the documents contained facts admitted or stipulated to, or otherwise proved beyond a reasonable doubt).

Here, Morales pleaded guilty to assault with a deadly weapon. Morales was also charged with a sentencing enhancement—an additional allegation that he personally inflicted great bodily injury upon the victim. The sentencing court decided that Morales's guilty plea to the assault necessarily included his assent to the enhancement. But in his plea agreement, Morales did not explicitly admit to inflicting great bodily injury: where the form provided space for a defendant to admit to any enhancement, Morales entered "n/a." Clerk's Papers at 36. Nor was the enhancement reflected in his sentence, a point conceded by the State. Even if the enhancement would have helped establish second degree assault in Washington—that the defendant inflicted substantial bodily harm—it is clear that Morales did not stipulate to or admit the allegation. At

most, Morales's guilty plea shows that he intended the unlawful act, not that he intended to inflict injury.

Alternatively, the State argues that a presentence investigation report provides the necessary facts to establish a second degree assault in Washington. The report contains a description of Morales's alleged conduct from the district attorney's file and a probation officer's interview with Morales. Although the report indicates that Morales admitted to stabbing the victim, this admission was not taken under oath, stipulated to in the plea agreement, or proved beyond a reasonable doubt.

Accordingly, Morales's plea agreement and the report are insufficient to establish facts that make the offenses comparable. As in *Lavery*, Morales neither admitted nor stipulated to facts in his plea agreement that would have established specific intent to cause bodily harm. *Lavery*, 154 Wn.2d at 258. We find that the two crimes are not factually comparable. Morales's California conviction should not count as a strike under the POAA, and therefore we remand for resentencing.

II. Statement of Additional Grounds

In his statement of additional grounds (SAG), Morales denies guilt, asserting that there is no evidence against him and that people made false accusations. We defer to the jury on all issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). In this case, the jury found Morales guilty of second degree assault beyond a reasonable doubt based on facts and testimony presented at trial. We will not disturb the jury's findings on appeal. He further alleges that someone who testified

against him was paid to do so. This is a matter outside the record and is therefore not reviewable on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

We vacate Morales's sentence and remand for resentencing.

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 pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Van Deren, J.