IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEDRICK DEMOND THOMAS, Appellant.	No. 42129-1-II UNPUBLISHED OPINION

Armstrong, J. — Dedrick Thomas argues that the trial court erred in calculating his offender score. We remand for resentencing.[1]

FACTS

This is the third time this case is before this court. *See State v. Thomas*, 158 Wn. App. 797, 243 P.3d 941 (2010). In January 2007, a jury convicted Thomas of eight counts of witness tampering. *Thomas*, 158 Wn. App. at 799. On his second appeal, this court determined that the eight counts on which he was convicted constituted the same unit of witness tampering, reversed seven of Thomas's eight convictions, and remanded for resentencing. *Thomas*, 158 Wn. App. at 802.

On remand, the trial court sentenced Thomas on one count of witness tampering. At his

[1] A commissioner of this court initially considered Thomas's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

sentencing hearing, the State argued that Thomas's offender score was four. In addition to two Washington felony convictions, the State argued that two Arkansas felony convictions counted toward his offender score. The State submitted certified copies of two Arkansas judgment and disposition orders: one for theft of property and the other for failure to appear. Both orders reported that the crimes for which Thomas was convicted were "C" felonies in Arkansas. The State also submitted the Arkansas charging document for Thomas's failure to appear conviction, which stated that his conviction was based upon his failure to appear at court on charges of residential burglary, a "B" felony. At sentencing, the State misstated the classification of Thomas's theft offense, characterizing it as a "B" rather than a "C" felony. The State submitted a copy of the felony theft provision of the Arkansas code in effect at the time of Thomas's Arkansas theft conviction. The prosecutor argued that because a "B" felony must be of an amount exceeding $2,500, it was comparable to felony theft in Washington.

Following the prosecutor's arguments, Thomas, appearing pro se with standby counsel, stated he had no objection to an offender score of four. The sentencing court accepted the prosecutor's analysis, did not conduct a comparability analysis on the record, and concluded the offender score was four. Based on that offender score, the sentencing court imposed 16 months incarceration upon Thomas.

ANALYSIS

Thomas argues that the State did not prove that his two Arkansas convictions were comparable to Washington felonies. He contends that with respect to the theft conviction, the elements of the crime in Arkansas and in Washington are not comparable. And he contends that the trial court erred in finding the failure to appear conviction to be comparable without

conducting a comparability analysis. The State responds that by agreeing to an offender score of four, Thomas acknowledged the existence and comparability of the Arkansas convictions, relieving the State of its burden to prove those facts.

The use of prior convictions as a basis for sentencing under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, is constitutionally permissible provided that the State proves their existence by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). "The best evidence of a prior conviction is a certified copy of the judgment." *Ford*, 137 Wn.2d at 480 (citing *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994)). A sentencing court may, however, rely on other comparable documents or transcripts as long as they provide minimum indicia of reliability. *Ford*, 137 Wn.2d at 480. "Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." *Ford*, 137 Wn.2d at 481.

In *State v. Mendoza*, 165 Wn.2d. 913, 928-29, 205 P.3d 113 (2009), the court held that a defendant must affirmatively acknowledge the "*facts and information*" the State introduces at sentencing before the State is relieved of its duty to prove criminal history by a preponderance of the evidence. The defendant's "mere failure to object" to his criminal history as conveyed by the State does not constitute such an affirmative acknowledgment. *Mendoza*, 165 Wn.2d at 928. A "defendant's silence is not constitutionally sufficient" to meet the State's burden of proof at sentencing. *State v. Hunley*, 161 Wn. App. 919, 928, 253 P.3d 448, *review granted*, 172 Wn.2d 1014 (2011)).

The State argues that Thomas affirmatively acknowledged that his offender score was

four, thus relieving the State of the constitutional requirement to prove his prior convictions. After the State concluded its argument at sentencing, the following exchange occurred:

> The Court: Mr. Thomas, offender score of four. Any objection?
> The Defendant: No, sir.
> The Court: Okay. I'm going to find that the offender score is four. There's no objection.

Report of Proceedings at 5. We conclude that Thomas's response that he had "no objection" to the State's assertion that his offender score was four is not an "*affirmative* acknowledgment" of the facts and information the State put forth regarding his criminal history. *Mendoza*, 165 Wn.2d at 928. And absent a defendant's affirmative acknowledgement of his or her criminal history, the State must meet its burden to prove Thomas's criminal history by a preponderance of the evidence. *Hunley*, 161 Wn. App. at 929. Therefore, we must consider whether the State met its burden here of establishing comparability between Thomas's Arkansas convictions and Washington felonies.

Illegal or erroneous sentences, including the improper inclusion of out-of-state convictions, may be challenged for the first time on appeal. *Ford*, 137 Wn.2d at 484-85. We review de novo a sentencing court's calculation of an offender score. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). When an offender has prior out-of-state convictions, the SRA requires the trial court to treat those convictions "'according to the comparable offense definitions and sentences provided by Washington law.'" *State v. Wiley*, 124 Wn.2d 679, 683, 880 P.2d 983 (1994) (quoting former RCW 9.94A.525(3) (1992)). A comparable foreign conviction counts toward the offender score as if it were the equivalent Washington offense. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

An out-of-state conviction may not be used to increase the defendant's offender score unless the State proves it is equivalent to a felony in Washington. *State v. Weiand*, 66 Wn. App. 29, 31-32, 831 P.2d 749 (1992). If the State fails to establish a sufficient record, then the sentencing court lacks the necessary evidence to determine if the out-of-state convictions should be included in the offender score. *Ford*, 137 Wn.2d at 480-81. If the State provides sufficient evidence, the sentencing court must conduct the comparison on the record. *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005).

A foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). A foreign offense is legally comparable if "the elements of the foreign offense are substantially similar to the elements of the Washington offense." *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). 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. *Morley*, 134 Wn.2d at 606. A conviction is factually comparable where the defendant's conduct would have violated a comparable Washington statute. *Lavery*, 154 Wn.2d at 255. The State bears the burden of providing sufficient evidence to prove the comparability of prior out-of-state convictions by a preponderance of the evidence. *Ford*, 137 Wn.2d at 480. "When the sentencing court incorrectly calculates the standard range . . . , remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

At the time of Thomas's conviction, Arkansas defined theft as follows:

(a) A person commits theft of property if he:
(1) Knowingly takes or exercises unauthorized control over, or makes an

> unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof; or
> (2) Knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof.
> . . . .
> [(b)](2) Theft of property is a Class C felony if:
> (A) The value of the property is less than two thousand five hundred dollars ($2,500) but more than five hundred dollars ($500); or
> (B) The property is obtained by threat; or
> (C) The property is a firearm valued at less than two thousand five hundred dollars ($2,500); or
> (D) The property is a credit card . . . or credit card account number.
> [(b)](3) Theft of property is a Class C felony if the property is livestock, and the value of the livestock is in excess of two hundred dollars ($200).

Former ACA § 5-36-103 (1997).

In 2000, when Thomas committed the Arkansas theft offense, all of the conduct proscribed in former ACA § 5-36-103 constituted a felony in Washington state. At that time, Washington defined "theft" as:

> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services; or
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him of such property or services; or
> (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him of such property or services.

Former RCW 9A.56.020(1) (1975). "Theft in the first degree," a class B felony, was defined in 2000 as theft of:

> (a) Property or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined in RCW 9.41.010; or
> (b) Property of any value other than a firearm as defined in RCW 9.41.010 taken from the person of another.

Former RCW 9A.56.030(1) (1995). "Theft in the second degree," a class C felony, was defined

as theft of:

> (a) Property or services which exceed(s) two hundred and fifty dollars in value other than a firearm as defined in RCW 9.41.010, but does not exceed one thousand five hundred dollars in value; or
> (b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or
> (c) An access device; or
> (d) A motor vehicle, of a value less than one thousand five hundred dollars.

Former RCW 9A.56.040(1) (1995).[2]

Although it appears that Thomas's Arkansas theft conviction was legally comparable to a Washington felony, the sentencing court failed to conduct the requisite comparability analysis on the record. After hearing the prosecution's recitation of Thomas's criminal history and receiving copies of the prior conviction into evidence, the trial court simply asked Thomas if he had an objection to the offender score. After Thomas stated that he did not, the sentencing court accepted the offender score without explaining the comparability of the offenses on the record. This error requires remand. *Labarbera*, 128 Wn. App. at 350.

Thomas's Arkansas information charging him with failure to appear defined his conduct as having

> FAILED TO APPEAR for trial on 1 count of Residential Burglary (B Felony), in violation of ACA § 5-39-201; after having been lawfully set at liberty on the condition he appear in the Circuit Court on January 8, 2001, he failed to appear being without reasonable excuse, in violation of ACA § 5-54-120, all against the peace and dignity of the State of Arkansas.

Clerk's Papers at 44. Washington, in 2001, defined bail jumping as follows:

> Any person having been released by court order or admitted to bail with

[2] Washington law also included as felonies theft of livestock, theft of any firearm, and obtaining property or services by threat. Former RCW 9A.56.080 (1986); RCW 9A.56.110 (1975); RCW 9A.56.300 (1994).

> knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear as required is guilty of bail jumping.

Former RCW 9A.76.170(1) (1983). Bail jumping is a felony when the person is being held on felony charges. Former RCW 9A.76.170(3)(a)-(c).

Even assuming that the Arkansas and Washington offenses are legally comparable, the trial court again neglected to conduct a comparability analysis on the record. Remand is necessary so that the State may prove the proper classification of the out-of-state convictions. *Labarbera*, 128 Wn. App. at 350.

We remand for resentencing with the comparability analysis placed on the record.

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.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.