

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL (NMI) SIMS,  
A/K/A MICHAEL D. DENTON,

Appellant.

No. 38879-1-II

UNPUBLISHED OPINION

Houghton, J. — Michael Sims appeals his sentence imposed following his plea of guilty to custodial assault, arguing that the trial court erred in calculating his offender score. We affirm.<sup>1</sup>

**FACTS**

Before sentencing, Sims challenged his criminal history. The State responded with copies of Tennessee’s criminal code pertaining to unlawful possession of controlled substances and aggravated assault. During the sentencing hearing, the State submitted as evidence certified copies of documents pertaining to his Tennessee convictions, including (1) a guilty plea, sentence, and disposition for unlawful cocaine possession; (2) a grand jury indictment for attempted second degree murder; and (3) a probation order, consent order, and judgment for aggravated assault resulting from a plea agreement on the attempted second degree murder charge. The trial court

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<sup>1</sup> Our commissioner court initially considered Sims’ appeal as a motion on the merits under RAP 18.14 and then transferred it to us as a panel of judges.

rejected Sims' challenges to his criminal history and included his Tennessee convictions in calculating his offender score. He appeals.

#### ANALYSIS

Sims contends that the trial court erred in sentencing him because it should not have included his Tennessee convictions for unlawful cocaine possession and aggravated assault in calculating his offender score.<sup>2</sup> Sims argues that the State failed to prove the comparability of either Tennessee conviction with Washington felonies.

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 Sentencing Reform Act of 1981, ch. 9.94A. RCW, 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 RCW 9.94A.525(3)). 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).

If the elements of the foreign statute are not identical to or are broader than the Washington definition of the crime, the trial court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether that conduct would have violated the comparable Washington statute. *State v. Duke*, 77 Wn. App. 532, 535, 892 P.2d 120 (1995); *see also State v. McCorkle*, 88 Wn. App. 485, 495, 945 P.2d 736 (1997), *aff'd*, 137

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<sup>2</sup> The trial court calculated Sims' offender score as 7, based on four Washington convictions for custodial assault and one Washington conviction for second degree assault and the two Tennessee convictions.

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Wn.2d 490, 973 P.2d 461 (1999). 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. RCW 9.94A.110 (recodified as RCW 9.94A.500 by Laws of 2001, ch. 10, § 6); *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

The trial court counted Sims' Tennessee conviction for unlawful cocaine possession.

Tennessee's law provides:

It is an offense for a person to knowingly possess or casually exchange a controlled substance, unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice.

Tenn. Code § 39-17-418(a). In the absence of a definition, Sims argues that the phrase "casual exchange" could encompass something other than possession or delivery. Appellant's Br. at 5.

Washington's law regarding unlawful possession of controlled substances provides:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013(1).

Tennessee's law prohibiting possession or casual exchange of cocaine is broader than Washington's law prohibiting only unlawful possession. Thus, we look to evidence of Sims' conduct in order to determine whether that conduct would have violated the comparable Washington statute. *McCorkle*, 88 Wn. App. at 495; *Duke*, 77 Wn. App. at 535.

Evidence in the record included certified copies of his guilty plea, sentence, and disposition, and each of those documents repeatedly listed his conduct as unlawful possession of

cocaine, not casual exchange. This evidence of his conduct supports, by a preponderance, the comparability of his Tennessee conviction for unlawful cocaine possession with Washington's law prohibiting unlawful cocaine possession. Thus, the trial court did not err when it included the Tennessee possession conviction in calculating his offender score.

The trial court also counted Sims' Tennessee conviction for aggravated assault.

Tennessee's law provides:

- (a) A person commits aggravated assault who:
  - (1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and:
    - (A) Causes serious bodily injury to another; or
    - (B) Uses or displays a deadly weapon; . . .
  - . . . .
  - (2)(b) . . . [B]eing the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect the child or adult from an aggravated assault as defined in subdivision (a)(1) or aggravated child abuse as defined in § 39-15-402.
  - (c) . . . [A]fter having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against the individual or individuals.

Tenn. Code § 39-13-102 (2002).<sup>3</sup>

Tenn. Code § 39-13-101 (2002)(a) defines assault as

- (1) Intentionally, knowingly or recklessly causes bodily injury to another;

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<sup>3</sup> The State concedes that it erroneously provided the trial court with a copy of Tennessee law as amended in 2005, rather than the law at the time of Sims' crime in 2002. Any error on this basis is harmless, however, because the amendment affected only the enhancement factors that Tennessee courts could consider during sentencing, not the elements necessary to establish the offense. *See State v. Gonzales*, 90 Wn. App. 852, 855, 954 P.2d 360 (1998) (a harmless error is one that is "trivial, formal, or merely academic and which in no way affects the outcome"). The trial court's inquiry remains unaffected. *See Morley*, 134 Wn.2d at 606 (the court's inquiry turns on the elements of the charged crime).

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Tenn. Code § 39-11-106(a)(2) (1997) defines “bodily injury” to include “a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.” Subsection (a)(34) defines “serious bodily injury [as a] bodily injury that involves”

(A) A substantial risk of death;

(B) Protracted unconsciousness;

(C) Extreme physical pain;

(D) Protracted or obvious disfigurement; or

(E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.

Tenn. Code § 39-11-106(a)(34) (1997).

And Tenn. Code § 39-11-106(a)(5) (1997) defines “deadly weapon” as

(A) A firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or

(B) Anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Washington’s law defining second degree assault provides:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or

agony as to be the equivalent of that produced by torture; or  
(g) Assaults another by strangulation.

RCW 9A.36.021(1).

Washington's common law defines assault as:

(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; 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).

RCW 9A.04.011(4)(a) defines "bodily injury" or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.011(4)(b) defines "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." And RCW 9A.04.011(6) defines "deadly weapon" as

any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

Tennessee's law defining aggravated assault is broader than Washington's law defining second degree assault, in that it includes as aggravated assault, a parent or custodian's refusal to protect the child or adult from aggravated assault or aggravated child abuse, Tenn. Code § 39-13-102(b), and assaults committed after having been enjoined or restrained by an order, diversion, or probation agreement, Tenn. Code § 39-13-102(c). Thus, again we look to evidence of Sims'

conduct in order to determine whether that conduct would have violated the comparable Washington statute. *McCorkle*, 88 Wn. App. at 495; *Duke*, 77 Wn. App. at 535.

The evidence here includes a certified copy of Sims' indictment for attempted second degree murder, which states that he attempted "to commit the offense of Second Degree Murder, as defined in T.C.A. 39-13-210, in that he did unlawfully and knowingly attempt to kill DARRELL ROGERS, in violation of T.C.A. 39-12-101, against the peace and dignity of the State of Tennessee." Ex. at 3.

As part of a plea agreement, Tennessee reduced the charge against him to aggravated assault. Washington's law encompasses the attempt to inflict bodily injury on another, including physical pain or injury, illness, or an impairment of physical condition. Thus, the evidence that he knowingly attempted to kill another person supports, by a preponderance, the comparability of his Tennessee conviction for aggravated assault with Washington's law prohibiting second degree assault. The trial court did not err when it included the Tennessee aggravated assault conviction in calculating his offender score.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record. RCW 2.06.040.

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Houghton, J.

We concur:

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Bridgewater, J.

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Van Deren, C.J.