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

STATE OF WASHINGTON, Respondent, v. LEROY A. JONES, Appellant.	))))))))))	No. 63223-0-I UNPUBLISHED OPINION FILED: September 7, 2010

Ellington, J. — Leroy Jones was convicted of first degree assault with a deadly weapon. The trial court determined that this was Jones' third "most serious offense" and imposed a sentence of life without parole under the Persistent Offender Accountability Act (POAA). Jones argues primarily that the trial court erred in denying his motion for a new trial or dismissal based on ineffective assistance of counsel and governmental mismanagement, and erred in imposing a POAA sentence. We affirm.

BACKGROUND

On the afternoon of September 10, 2007, Leroy Jones was involved in a fight with Taurian Alford near a bus stop in downtown Seattle. Within minutes, three of Alford's friends, including T'Shaun Bennett and Devin Wilturner, ran up and joined the fight. When the police arrived, they saw that Jones had a knife in his hand and was being restrained by the others. He continued struggling and did not drop the knife until

a police officer tasered him.

Jones was charged with second degree assault with a deadly weapon. At trial, the State argued that Jones attacked Alford with the knife, and that Alford's friends intervened to save him. The defense theory was that Jones pulled out his knife in self-defense only after Alford's friends attacked him.

The State produced a number of eyewitnesses. Alford's cousin T'Shaun Bennett testified he saw Alford and Jones arguing on the street and then heard Alford shout that Jones had a knife. Bennett saw the knife in Jones' hand as Jones chased Alford down the street. Bennett ran up and saw Jones on top of Alford, trying to stab him. Bennett and Wilturner struggled with Jones until the police arrived.

The State next presented eyewitness testimony of coworkers Endre Veka, Erik Fierce, Peter Schwab, and Gus Iverson. They testified they were returning to their office on the way back from a coffee break when Alford came running up to them and said "someone was chasing him,"[1] or "he's trying to stab me."[2] At first they were skeptical of Alford's motives, but within seconds they saw Jones run up and attack Alford. They saw two more young men join the fight, apparently trying to subdue Jones. The four coworkers gave slightly varying descriptions of the events, including the point at which they noticed the knife, but all agreed that Alford appeared primarily to be defending himself.

The State sought a material witness warrant for Alford but was unable to secure

[1] Report of Proceedings (RP) (Apr. 8, 2008) at 138.

[2] Id. at 87.

his presence for trial. Alford's mother testified she had sent him to live with family in Missouri after this incident.

Detective Tim DeVore testified that on September 13, 2007 he took taped statements from three witnesses to the fight: Peter Schwab, Erik Fierce, and Lori Brown. The prosecutor and defense counsel had copies of written statements of Schwab and Fierce, but no copies of the taped statements. Defense counsel moved for a mistrial. The court denied the motion but granted a continuance to allow defense counsel to locate Brown and to recall Schwab and Fierce for further cross-examination.

Brown, a government employee who was waiting at the bus stop when the fight began, testified for the State. She said she saw one man chasing another. The one being chased stopped and stood his ground, and the two started to fight. She was not watching closely and did not see any weapons, but she heard someone say something about a knife after other men joined the fight. Fierce, Schwab and DeVore appeared again for recross examination.

Jones did not testify. The sole defense witness was Mark Forbes, a transportation supervisor who was working nearby when the fight occurred. Forbes testified he saw two men walking together. They started arguing and then fighting. He saw three other men join the fight, and heard someone say he "had a knife."[3] He then noticed a knife cupped in the hand of one of the men. Forbes thought the man with the knife seemed to be protecting himself from the others.

The jury found Jones guilty as charged. The prosecutor notified defense

[3] RP (Apr. 14, 2008) at 70.

counsel he believed this was Jones' third "most serious offense" and that he would seek a life sentence under the POAA. Jones' counsel moved to withdraw because he believed he

may have been ineffective. Jones then obtained new counsel and moved for a new trial on the basis of ineffective assistance, discovery violations under CrR 4.7, and governmental mismanagement under CrR 8.3(b). The trial court denied the motion for a new trial or dismissal and, after determining that the conviction amounted to a third strike, sentenced Jones to life in prison without parole. Jones appeals.

DISCUSSION

Ineffective Assistance Of Counsel

Jones argues the trial court erred in denying his motion for a new trial because his counsel was ineffective in failing to adequately investigate his criminal history and in failing to investigate two witnesses.

A decision to grant or deny a new trial based on a claim of ineffective assistance of counsel will not be disturbed absent a manifest abuse of discretion.[4] "'To demonstrate ineffective assistance of counsel, the defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.'"[5] This means the defendant "must affirmatively prove prejudice, not simply show that 'the errors had some conceivable effect on the outcome.'"[6] Both prongs must be met to satisfy the test.

[4] State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

[5] State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (quoting Strickland v. Washington, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[6] State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (emphasis

[7]

Jones contends his attorney inadequately investigated his Florida criminal history and failed to advise him the Florida assault conviction was a strike crime in Washington. Jones relies primarily on State v. Crawford.[8]

Crawford was charged with first degree robbery and second degree assault. He had a Washington conviction for second degree robbery and a Kentucky conviction for first degree sex abuse. Both the prosecutor and defense counsel were initially unaware of the Kentucky conviction[9] The prosecutor offered to recommend a sentence at the low end of the standard range of 57 to 75 months. Even after learning of the Kentucky conviction, neither the prosecutor nor defense counsel investigated whether it counted as a strike, and did not engage in further plea negotiations.[10] Crawford and his attorney thus went to trial believing that his standard range was 57 to 75 months. After Crawford was found guilty, the prosecutor determined that the Kentucky conviction was a strike, making him subject to a life sentence under the POAA.[11]

Crawford moved for a new trial or dismissal, arguing that had he known prior to trial that he faced a potential life sentence, he would have accepted the prosecutor's plea offer.[12] Defense counsel explained that she had not investigated the Kentucky

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omitted) (quoting Strickland, 466 U.S. at 693).

[7] State v. Brockob, 159 Wn.2d 311, 345, 150 P.3d 59 (2006).

[8] 159 Wn.2d 86, 147 P.3d 1288 (2006).

[9] Id. at 90.

[10] Id. at 91.

[11] Id.

[12] Id.

conviction because she assumed it was a misdemeanor. The trial court denied Crawford's motion to dismiss and imposed a mandatory life sentence under the POAA.[13] Division Two of this court vacated the judgment and concluded Crawford did not receive procedural due process or effective assistance of counsel.[14]

The Washington Supreme Court reversed, holding that "[p]rocedural due process does not require that a criminal defendant receive pretrial notice of a possible life sentence under the POAA."[15] The court further held that although defense counsel's performance in failing to investigate was deficient, Crawford was unable to demonstrate prejudice.[16] The court reasoned that (1) there was no indication the prosecutor was willing to offer Crawford the option of pleading guilty to a nonstrike offense, (2) it was highly speculative to conclude the prosecutor would charge a defendant with a nonstrike offense in this case, (3) the POAA grants no discretion to judges or prosecutors in the sentencing of persistent offenders, and (4) Crawford presented no mitigation evidence.[17]

Jones' argument is that his counsel was deficient in failing to advise him that the Florida assault conviction was a strike, and he was prejudiced because he would have accepted the State's plea offer to the nonstrike offense of third degree assault. The State responds that unlike Crawford, Jones' defense counsel repeatedly advised him

[13] Id. at 92.

[14] Id.

[15] Id. at 93.

[16] Id. at 99.

[17] Id. at 100–01.

his present conviction was potentially a third strike.

Assuming Jones' attorney did not meet his obligation under Crawford to investigate whether the prior conviction was a strike crime, he nonetheless advised Jones he could be facing a third strike. Yet Jones refused the plea offer and said he did not care if he was sentenced to life in prison. Jones later expressed an interest in pleading guilty to assault in the fourth degree, but there is no evidence the State ever offered that option or would have been willing to do so.

Moreover, 10 years ago, Jones was charged with robbery in the second degree. His attorney advised him he was facing a third strike if convicted. Jones entered an Alford[18] plea to a reduced charge of assault in the third degree to avoid a third strike conviction. Jones thus cannot establish ineffective assistance of counsel because he can establish no prejudice. The trial court entered findings of fact that defense counsel's performance was not inadequate and that Jones was not prejudiced in any event. The record supports these findings. The ineffective assistance claim fails.

Jones also contends he received ineffective assistance because defense counsel failed to contact eyewitnesses Michael Hamilton and Lori Brown prior to trial. Without stating whether this omission constituted deficient performance, the trial court concluded Jones was not prejudiced because Brown ultimately testified and Hamilton's proposed testimony was not exculpatory.

We agree. Brown's testimony at trial was similar to that of the other eyewitnesses, and was not exculpatory. And although Hamilton placed Jones as the

[18] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

one being tackled, this testimony would not likely have changed the outcome of the trial because it contradicted four other eyewitnesses. Further, Hamilton's testimony that he saw the older man display a knife when the fight started and before the other men

joined the fight was detrimental to the defense.

Jones also argues defense counsel was ineffective by failing to object to the testimony of Alford's mother Julia Buchanan, who stated that she sent Alford to live with family in Missouri partially because she was afraid for him to testify. "[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted."[19] "Only in egregious circumstances, on testimony central to the State's case, will failure to object constitute incompetence of counsel justifying reversal."[20]

Jones, relying on State v. Bourgeois,[21] contends that Buchanan's testimony unfairly and prejudicially bolstered Alford's credibility and that the jury likely viewed it as substantive evidence of guilt. In Bourgeois, witnesses admitted they were reluctant to testify out of fear of retaliation. The prosecutor argued in closing that a reasonable fear of retaliation made their testimony credible. The court held that unless a witness's credibility has been attacked, it is improper to mention fear of testifying in order to bolster credibility.[22] The error, however, was deemed harmless.[23]

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[19] Saunders, 91 Wn. App. at 578 (internal citations omitted).

[20] State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

[21] 133 Wn.2d 389, 945 P.2d 1120 (1997).

[22] Id. at 400–01.

[23] Id. at 403–05.

Bourgeois is distinguishable. First, the State did not expressly use Buchanan's testimony to bolster Alford's credibility. Second, Alford did not testify at trial, and his credibility was not directly at issue. Third, Buchanan's testimony was not central to the State's case.[24] Even assuming there was no tactical reason not to object, the result of the trial would not have been different had defense counsel objected.

Discovery Violation

Jones argues the trial court erred in denying his CrR 4.7 motion for a mistrial based on a discovery violation. Jones brought the motion after discovering that Detective DeVore had taken taped statements from eyewitnesses Peter Schwab, Erik Fierce, and Lori Brown which had not been provided to the defense.

The trial court ruled this violated CrR 4.7(a)(1)(i), which requires the prosecutor to provide any written or recorded statements of its witnesses to the defense "to protect against surprise that might prejudice the defense."[25] The court granted a three day continuance so the statements of Schwab and Fierce could be reviewed and Brown could be located and interviewed. Brown subsequently testified for the State, and Schwab and Fierce were recalled for further cross-examination.

CrR 4.7(h)(7)(i) provides that if a party fails to comply with the discovery rules, the court may order discovery, grant a continuance, dismiss the action, or enter any other order it deems just under the circumstances. "[A] trial judge has wide latitude

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[24] In his reply brief, Jones argues that this testimony was central to the State's case because Buchanan's son Bennett was a key witness. But Buchanan is Alford's mother, not Bennett's mother.

[25] State v. Smith, 67 Wn. App. 847, 851, 841 P.2d 65 (1992).

when imposing sanctions for discovery violations and ruling on motions for a new trial."[26] Courts may dismiss criminal actions under CrR 4.7 where the State's inexcusable failure to act with due diligence infringes on the defendant's rights.[27] The court's ruling will not be disturbed on appeal absent a showing of abuse of discretion.[28]

Jones argues the continuance was an insufficient remedy. Noting that Schwab's statements were inconsistent regarding the moment he saw the knife, Jones contends late disclosure of Schwab's statement prejudiced him because he was unable to utilize these inconsistencies in his opening statement and in cross-examination of Schwab and other witnesses. In addition, Jones contends he did not have sufficient time to retain Dr. Geoffrey Loftus, who would have opined that Schwab's later testimony was not based on an accurate perception of events. Jones further contends he was prejudiced by the late disclosure of Lori Brown's statement, which tended to negate guilt.

But the new information did not change the defense theory, and did little or nothing to bolster it. Schwab said he saw a pointy object in Jones' hand as he approached Alford, and saw that it was a knife before Alford's friends joined in. Fierce said that he noticed the knife after the others joined the fight. And Lori Brown testified that she did not watch the fight closely and did not see a knife, but noticed someone making jabbing motions as if he had a knife. Dr. Loftus' testimony regarding the validity

[26] State v. Dunivin, 65 Wn. App. 728, 731, 829 P.2d 799 (1992).

[27] See State v. Price, 94 Wn.2d 810, 814–15, 620 P.2d 994 (1980).

[28] Dunivin, 65 Wn. App. at 731.

of Schwab's memories would have been speculative. Finally, the jury heard from several witnesses who gave inconsistent testimony. The trial court did not abuse its discretion in its choice of remedy for the State's CrR 4.7 violation.

Governmental Misconduct

Jones argues the trial court erred in denying his CrR 8.3(b) motion to dismiss based on the State's oversight in failing to disclose the tapes. CrR 8.3(b) provides that the court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Dismissal is an extraordinary remedy that has been limited to "truly egregious cases of mismanagement or misconduct by the prosecutor."[29] Governmental misconduct, however, "need not be of an evil or dishonest nature; simple mismanagement is sufficient.'"[30] "A trial court's power to dismiss charges is reviewable under the manifest abuse of discretion standard."[31]

Here, the court did not abuse its discretion in denying the extraordinary remedy of dismissal. As discussed above, the trial court properly granted a continuance to remedy the error, and the defense did not suffer prejudice.

Jones further argues the trial court erred in denying his motion to dismiss under CrR 8.3(b) based on the State's misrepresentations regarding his criminal history and

[29] State v. Koerber, 85 Wn. App. 1, 4–5, 931 P.2d 904 (1996) (quoting State v. Duggins, 68 Wn. App. 396, 401, 844 P.2d 441 (1993)).

[30] State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997) (emphasis omitted) (quoting State v. Blackwell, 120 Wn.2d. 822, 831, 845 P.2d 1017 (1993)).

[31] Id. at 240.

its legal ramifications. He contends the prosecutor misrepresented his criminal history by mistakenly listing a robbery conviction in Florida. After it was discovered Jones had been convicted of aggravated assault rather than robbery, the prosecutor told the court he did not believe it was a strike offense. Jones contends the prosecutor knew or should have known the charged offense would result in a third strike, and that the prosecutor's misrepresentation of the law affirmatively misled him into going to trial rather than attempting a plea bargain. The State responds that although the prosecutor misunderstood the legal impact of Jones' criminal history, he made no intentional misrepresentations and there was no arbitrary action or mismanagement because the prosecutor accurately advised the defendant before trial that his criminal history included two Florida convictions.

The court did not abuse its discretion in finding that this error was not sufficiently egregious as to warrant dismissal. There is no indication the prosecutor's misrepresentation was intentional. Moreover, an offender has no constitutional or statutory right to pretrial notice of the possibility of being sentenced as a persistent offender.[32] Jones' contention that he rejected the State's plea offer because the prosecutor misled him is not persuasive. His counsel advised him repeatedly that he was very concerned that the prior conviction was a strike. Despite this advice, Jones told his counsel he would not accept a plea bargain. Moreover, Jones' argument that the prosecutor should have known both Florida convictions were strikes runs counter to his argument (addressed below) that the court erred in sentencing him to life in prison

[32] Crawford, 159 Wn.2d at 94.

under the POAA because one prior was not a strike.

Aggressor Instruction

Jones argues the court erred by giving the jury an aggressor instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.[33]

An aggressor instruction should be used with care.[34] "Nevertheless, it is not error to give one when there was credible evidence from which the jury could reasonably have concluded that it was the defendant who provoked the need to act in self-defense."[35] When there is conflicting evidence as to whether the defendant's conduct precipitated a fight, the instruction is appropriate.[36] "[T]he provoking act must also be related to the eventual assault as to which self-defense is claimed."[37]

Jones argues the aggressor instruction was not justified because the State's theory was that Jones attacked Alford with a knife from the very beginning of the encounter, so that the fight with Alford was one ongoing assault and there was no separate provoking conduct. Jones further argues that even if he was aggressive toward Alford, he had the right to defend himself against Alford's friends.

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[33] Clerk's Papers at 72.

[34] State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

[35] State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

[36] Riley, 137 Wn.2d at 910.

[37] State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989).

The State responds that the aggressor instruction was made necessary by the defense theory, which was that there were two different assaults: first, the fight between Jones and Alford alone, which did not involve a knife and could not constitute assault in the second degree, and second, when Jones was attacked by Alford's friends and pulled a knife in self-defense. The State contends the jury was properly instructed that Jones could not provoke the altercation by tackling Alford and then stabbing him in self-defense after Alford's friends came to assist him.

There was strong evidence that Jones began the altercation by tackling Alford, and thus the evidence was in conflict as to whether Jones precipitated the altercation. Given the defense theory, the court did not err in giving the aggressor instruction.

Prior Juvenile Convictions

Jones argues the trial court erred in refusing to admit State witness T'Shawn Bennett's prior juvenile convictions for third degree possession of stolen property, third degree malicious mischief, and three convictions for second degree taking a motor vehicle under ER 609(d). Admission of evidence under ER 609(d) is reviewed for abuse of discretion.[38]

Under ER 609(d), evidence of juvenile adjudications is generally not admissible unless the offense "would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." ER 609(d) "requires a positive showing that the prior juvenile record is necessary to determine guilt."[39] In State v. Gerard,[40] the court held

[38] State v. Gerard, 36 Wn. App. 7, 11, 671 P.2d 286 (1983).

that the trial court did not abuse its discretion in excluding the juvenile convictions of the State's witness, noting that the defendant did not give any reason for admissibility beyond general impeachment and that such evidence would be of dubious value in a bench trial.[41]

Jones contends the juvenile convictions were necessary evidence because without them Bennett, Alford, and the others were unfairly sanitized, leading the jury to discredit Jones' self-defense claim. But Jones presents no persuasive reason why Bennett's prior juvenile adjudications would be necessary for a fair determination of Jones' guilt, apart from a general attack on credibility. Refusing to admit the evidence was not an abuse of discretion, and in any event, there is no reasonable probability the omission of this evidence materially affected the outcome, especially given the adverse testimony of the witnesses who had no criminal history.

Cumulative Error

Jones argues that cumulative error denied him a fair trial. A defendant may be entitled to a new trial when errors, even though not individually reversible, cumulatively result in a trial that was fundamentally unfair.[42] This standard has not been met.

POAA Sentence

Jones argues the trial court erred in concluding his Florida convictions for aggravated battery and aggravated assault were legally comparable to Washington

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[39] Id. at 12.

[40] 36 Wn. App. 7, 671 P.2d 286 (1983).

[41] Id. at 12.

[42] State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

offenses and constituted strikes for purposes of sentencing. The POAA mandates a sentence of life without parole if the offender has a current conviction for a "most serious offense" and two prior convictions "whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score."[43]

In determining the comparability of a foreign offense, the court applies a two part test:

> A court must first query whether the foreign offense is legally comparable-that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable-that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.[44]

The State bears the burden of proving that prior convictions from other jurisdictions are comparable to Washington crimes.[45] "Courts conduct de novo review of a sentencing court's decision to consider a prior conviction as a strike."[46]

Jones does not dispute that he was convicted of aggravated battery and aggravated assault in Florida. Nor does he dispute that the elements of both crimes in Florida are comparable to the "most serious offense" of assault in the second degree in Washington.[47] The State contends the analysis ends there. But Jones argues the

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[43] RCW 9.94A.030(34), .570.

[44] State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

[45] In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005).

[46] Thiefault, 160 Wn.2d at 414.

[47] In Washington, RCW 9A.36.021(1)(c) and (e) provide that "[a] person is guilty

Florida offenses are not comparable because diminished capacity is not an available defense in Florida and that the availability of this defense directly impacts the element of intent.

Jones relies on two relatively recent Washington Supreme Court cases, In re Personal Restraint of Lavery[48] and State v. Stockwell.[49] The issue in Lavery was whether the crime of federal bank robbery is comparable to robbery in the second degree in Washington. The court began its analysis by stating that when "the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense."[50] The court then stated:

> 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.[51]

The court held that because the intent elements of federal bank robbery and second

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of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . (c) [a]ssaults another with a deadly weapon; or . . . (e) [w]ith intent to commit a felony, assaults another." Fla. Stat. Ann. 784.021(1)(b) defines "aggravated assault" as "an assault . . . [w]ith an intent to commit a felony." Fla. Stat. Ann. 784.045(1)(a)(2) states that "[a] person commits aggravated battery who, in committing battery . . . [u]ses a deadly weapon."

[48] 154 Wn.2d 249, 111 P.3d 837 (2005).

[49] 159 Wn.2d 394, 150 P.3d 82 (2007).

[50] Lavery, 154 Wn.2d at 255.

[51] Id. at 255–56 (citations omitted).

degree robbery are not the same, the offenses are not substantially similar and are not legally comparable for POAA sentencing purposes.

In Stockwell, the court considered whether a conviction for first degree statutory rape under a former statute is comparable to the present offense of first degree rape of a child. The defendant argued the new statute is not comparable because it added an element of nonmarriage, and therefore criminalizes less conduct and provides a defense not available under prior law. The court concluded that first degree statutory rape is a strike under POAA.[52] In its analysis, the court reiterated that "if the elements of the strike offense and the elements of the foreign (or prior) crime are comparable, the former (or prior) crime is a strike offense."[53] Then, citing Lavery, the court added that "when 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."[54] But because the court concluded that the crimes were comparable since nonmarriage is an implied element of the crime of first degree statutory rape, this statement is dicta.

The State argues that the discussion in Lavery and Stockwell should not be read to require sentencing courts to identify all possible defenses available in the foreign jurisdiction in conducting a comparability analysis.[55] Relying on State v. Berry,[56] the State further argues that "expanding the comparability analysis beyond an elemental analysis would unnecessarily complicate an already difficult process."[57] Moreover,

[52] Stockwell, 159 Wn.2d at 400.

[53] Id. at 397.

[54] Id.

[55] RCW 9.94A.525(3).

[56] 141 Wn.2d 121, 5 P.3d 658 (2000).

[57] Id. at 132.

according to the State, this process would likely result in the exclusion of nearly all foreign convictions.

The dicta regarding comparability in Lavery and Stockwell is just that: dicta. We strongly doubt the court intended its discussion of available defenses as anything other than a means of distinguishing specific intent crimes from general intent crimes. If we were to accept Jones' argument, sentencing courts would be required to analyze the criminal jurisprudence of other states to insure that there were no defenses available in Washington that were unavailable in the state of conviction.[58] Furthermore, Jones' argument runs counter to the plain language of RCW 9.94A.525(3) that "out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." The statute contains no language suggesting that defenses must also be identical.

Because Jones' two Florida convictions are for crimes identical to the elements of Washington's assault in the second degree, no further analysis is required. The trial court properly found that Jones is a persistent offender and sentenced him to life in

[58] The State also argues that Jones is incorrect in asserting that there was no diminished capacity defense in Florida at the time of his prior convictions. In State v. Bias, 653 So.2d 380, 383 (Fla. 1995), the Florida Supreme Court held that expert opinion was admissible to show that voluntary intoxication, combined with a mental disease or defect, prevented the defendant from forming the specific intent to commit the crime. But the court specifically reiterated that "expert evidence of diminished capacity is inadmissible on the issue of mens rea" and cautioned that the defense of voluntary intoxication cannot be used as a label for what in reality is a diminished capacity defense. Id. at 382. Thus, Jones is correct that diminished capacity was not an available defense in Florida. But because we hold that the comparability analysis is limited to the elements of the crime rather than the availability of defenses, this is of no consequence.

prison under the POAA.

Sentencing Without Jury Determination of Valid Priors

Jones argues that the court lacked authority to impose a persistent offender sentence without a jury finding that he had constitutionally valid prior convictions. He contends that the sentence violated his Sixth Amendment right to jury trial and his Fourteenth Amendment right to due process. The Washington Supreme Court has held there is no right under the state or federal constitution to a jury determination of prior convictions at sentencing.[59]

Affirmed.

Ellington, J.

WE CONCUR:

Leach, a.c.j.

Cox, J.

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[59] State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003).