IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 64004-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ANTHONY MARTINEZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 19, 2010
	)	

Lau, J. — Anthony Martinez appeals his sentence for second degree burglary, first degree malicious mischief, and making or having burglar tools. He contends that the sentencing court miscalculated his offender score because it relied on insufficient proof to establish his three prior New York burglary convictions. Because a New York "certificate of disposition"[1] is a judgment and sentence under New York law, we conclude substantial evidence supports the court's offender score calculation. We affirm the judgment and sentence.

[1] The parties refer to these documents alternatively as "certificates of disposition" and "certificates of disposition indictment;" we use the former term.

FACTS

A jury convicted Martinez of second degree burglary, first degree malicious mischief, and making or having burglar tools. At sentencing, the State alleged that Martinez was convicted in New York on guilty pleas of third degree burglary in 1993, 1999, and 2002. To prove these convictions, the State introduced certified copies of "certificate[s] of disposition" for each conviction, "criminal history record information" maintained by New York's Division of Criminal Justice Services, and a Queens County indictment for the 2002 conviction. Records for the 1993 and 1999 burglary convictions, however, showed the names, "Miguel Lopez" and "Tony Ramos." To prove that Martinez was the individual convicted of the 1993 and 1999 convictions, the State introduced certified copies of three fingerprint cards that were included in the New York criminal history record and a fingerprint comparison report prepared by the Washington State Patrol identification section.

Based on this evidence, the court determined that Martinez was the same person as the named defendants in the New York convictions.

> So I will conclude and reiterate my decision from this morning that I do believe that the person seated before me known as Anthony Martinez is the same person from the State of New York with three prior Burglary in the 3rd Degree convictions from Queens and the Bronx. And that the certification of records from the State of New York indicating the same do meet the burden of proof for this Court to consider those convictions.

Verbatim Report of Proceedings (VRP) (Feb. 6, 2006) at 42. Martinez does not assign error to that ruling.

The court reserved for later ruling whether the certificates of disposition sufficiently established the existence and validity of the prior New York convictions. VRP (Feb. 6, 2006) at 42. At a February 12, 2008 hearing, the court ruled,

> [T]his is not an absolute certainty in my mind; however, I do believe the certificates of disposition and indictment maintained by the court clerk and certified as such are valid proof of the fact that Mr. Martinez was found guilty by plea I think in every case and sentenced in the Supreme Court, which is their trial court, State of New York, on each of these occasions. And I am ruling that because I have nothing before me to base a constitutionally invalid plea or sentencing on that I will count these as criminal history. But I fully expect this is a possible area of new rulings from our higher court should they examine this case to determine whether single page documents, certificate[s] of disposition[ ], and indictments, along with indictment information themselves are going to be enough for the State of Washington to count them as criminal history.

VRP (Feb. 12, 2008) at 8–9. The court sentenced Martinez and included the three New York burglary convictions to calculate his offender score.[2] Martinez appeals.

ANALYSIS

Martinez's sole contention on appeal[3] is the State failed to prove by a preponderance of the evidence that he was previously convicted of three New York burglaries. Specifically, he argues that because "the only 'proof' of the New York convictions were documents entitled 'certificate of disposition of indictment' and indictments," the State has "not prove[d] by a preponderance of the evidence that Martinez was convicted of three New York burglaries." Br. of Appellant at 1, 8. He

[2] The court sentenced Martinez on the second degree burglary conviction to 38 months based on an offender score of 7 and on the first degree malicious mischief conviction to 14 months based on an offender score of 4. Finally, on the gross misdemeanor making or having burglary tools conviction, the court imposed 365 days.

[3] Martinez makes additional arguments in his statement of additional grounds for review.

does

not challenge the comparability of the New York offenses, the admissibility of the State's evidence, the constitutional validity of his pleas or convictions, or that he is the defendant named in the New York records. The State replies that the certificate of disposition is a judgment under New York law and is therefore sufficient to establish the convictions.

The State must prove the existence of a prior conviction by a preponderance of the evidence. State v. Rivers, 130 Wn. App. 689, 697, 128 P.3d 608 (2005) (citing State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002)). The best evidence of a prior conviction is a certified copy of the judgment and sentence, and "[t]he state may introduce other comparable evidence only if it is shown that the [certified copy] is unavailable for some reason other than the serious fault of the proponent." Lopez, 147 Wn.2d at 519; Rivers, 130 Wn. App. at 698. "In that case, comparable documents of record or trial transcripts may suffice." Rivers, 130 Wn. App. at 699. An offender score is reviewed de novo unless it involves factual or discretionary determinations. State v. Booker, 143 Wn. App. 138, 141, 176 P.3d 620 (2008). The factual question of whether the prior conviction exists and is a conviction of the defendant is reviewed for substantial evidence. See State v. McCorkle, 88 Wn. App. 485, 492–93, 945 P.2d 736 (1997). "Substantial evidence exists where there is a 'sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.'" State v. Finch, 137 Wn.2d 792, 856, 975 P.2d 967 (1999) (quoting State v. Hill, 123 Wn.2d

641, 644, 870 P.2d 313 (1994)).

If a defendant disputes material facts at sentencing, including the existence of a prior conviction, "the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537." RCW 9.94A.530(2). Here, Martinez objected and disputed whether the evidence established the existence of the prior New York convictions. VRP (Feb. 6, 2009) at 23. The sentencing court heard extensive argument on the State's evidence, allowed the parties to submit additional briefs,[4] and held a second hearing on the matter. RP (Feb. 6, 2009) at 31–32; 42–43.

The State relies on State v. Harris, 148 Wn. App. 22, 197 P.3d 1206 (2008). There, Harris appealed the use of several Louisiana convictions to calculate his offender score following a conviction on plea of guilty for first degree theft. Harris, 148 Wn. App. at 25. Although the documents the State introduced to prove Harris's prior Louisiana convictions were "not obviously judgment and sentences of the sort Washington courts issue," the court held,

> Having scrutinized the State's evidence, we hold that the State presented judgments conforming to the Louisiana statute.
>
> Further, under the same Louisiana statute, a sentence is pronounced orally and is documented only in the court minutes. La.Code Crim. Proc. Ann. art. 871(A). Here, the State submitted the relevant court minutes and, therefore, submitted the documents necessary to prove Louisiana sentences. Accordingly, we hold that the State presented judgments and sentences for each of the five prior Louisiana convictions.

[4] The State submitted a supplemental brief, but Martinez did not.

Harris, 148 Wn. App. at 30, 31. And Washington courts have allowed records that vary from those in Washington to establish the existence of prior convictions. See, e.g., State v. Vickers, 148 Wn.2d 91, 120, 59 P 3d 58 (2002) (signed docket sheet of Massachusetts court indicating guilty plea); State v. Morley, 134 Wn.2d 588, 611,952 P.2d 167 (1998) (court martial record); State v. Winings, 126 Wn. App. 75, 91–93, 107 P3d 141 (2005) (California criminal complaint, statement on plea of guilty, minute orders, and abstract of judgment); State v. Reinhart, 77 Wn. App. 454, 456–57, 891 P.2d 735 (1995) (FBI "rap sheet," certified copies of unsigned Oregon judgments and sentences, Oregon presentence records).

Like Harris, the State introduced documents that conform to New York law and establish that a certificate of disposition is a judgment.

> Except where a sentence of death is pronounced, a certificate of conviction showing the sentence pronounced by the court, or a certified copy thereof, constitutes the authority for execution of the sentence and serves as the order of commitment, and no other warrant, order of commitment or authority is necessary to justify or to require execution of the sentence.

N.Y. C.P.L § 380.60 (emphasis added). And "[a] certificate issued by a criminal court, or the clerk thereof, certifying that a judgment of conviction against a designated defendant has been entered in such court, constitutes presumptive evidence of the facts stated in such certificate." N.Y. C.P.L § 60.60(1). New York courts have reiterated these principles and interpreted these statutes consistent with the argument advanced by the State. See, e.g., People ex rel. Frantz v. Smith, 35 A.D.3d 1024, 1025, 826 N.Y.S.2d 775 (2006) (citing N.Y. C.P.L § 380.60 and stating, "certificate issued by the clerk of the criminal court certifying that the judgment of conviction against defendant has been entered in

the court . . . constitutes authority for the execution of the sentence and serves as the order of commitment"); People v. Mezon, 228 A.D.2d 621, 644 N.Y.S.2d 763 (1996) (citing N.Y. C.P.L. § 60.60(1) and holding defendant properly sentenced as persistent offender because certified copies of judgments of conviction constituted presumptive evidence of prior convictions).

And People v Compton, 277 A.D.2d 913, 914, 716 N.Y.S.2d 263 (N.Y. 2000), makes clear that N.Y. C.P.L. § 60.60(1) extends to the specific type of certificate of conviction at issue here—a certificate of disposition. "The certificates of disposition attested to by the Clerk of Bronx County stating that defendant previously was convicted of criminal sale of a controlled substance in the third degree (Penal Law § 220.39) and manslaughter in the first degree (Penal Law § 125.20) constitute presumptive evidence of those convictions." Under New York law, the certificates of disposition are sufficient to prove the New York judgments. And Martinez submitted no contrary evidence to undermine the existence and validity of his New York convictions. In addition, the State introduced a certified copy of a "criminal history record information" maintained by New York's Division of Criminal Justice Services, which shows the three third degree burglary convictions. Finally, the State introduced a certified copy of a Queens County indictment for the 2002 third degree burglary conviction. On this record, the State has established by substantial evidence the existence and validity of Martinez's New York convictions.

Certification of the New York Judgments

Finally, while Martinez does not clearly raise the issue, the State addressed whether the certificates of disposition

were properly certified. Under RCW 5.44.010,

> [t]he records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

And under New York law,

> [a]ll records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts
>
> contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician.

NY CPLR § 4518 (c) (emphasis added). Similarly,

> [w]here a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated.

NY CPLR § 4520.

Here, the certificates of disposition are all certified by the court clerk for the relevant county. They all bear the embossed seal of the county court and state, "[I]n witness whereof, I have hereunto set my hand and affixed my official seal on this date . . ." Ex. 3, 4, 5. And each certificate of disposition begins, "I hereby certify . . . ." Ex. 3, 4, 5. These seals and certifications satisfy both RCW 5.44.010 and NY CPLR sections 4518 and 4520. And a county clerk is "an employee delegated for [certification] purpose" under section 4518 and "a public officer . . . required or authorized . . . to make a certificate or an affidavit to a fact ascertained" under section 4520. We conclude the certificates of disposition were properly certified under both Washington

and New York law.

Statement of Additional Grounds (SAG)

Martinez raises two additional arguments in his SAG. First he argues that there was "insufficient evidence . . . to show I entered into the building." Second, Martinez argues that the "rap sheet" incorrectly describes an individual who is white and has tattoos on his face and forearms. But our review of the record indicates no reviewable error.

We affirm Martinez's judgment and sentence.

WE CONCUR: