IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66475-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOHN A. JONES III,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 12, 2012
	)	

Lau, J. — We previously remanded for resentencing because the sentencing court imposed an exceptional sentence without correctly determining John Jones's standard range on his conviction for second degree assault. State v. Jones, noted at 154 Wn. App. 1017, 2010 WL 264998. On resentencing, the court calculated Jones's offender score as 7 and again imposed 120-month exceptional sentence. Because the court's offender score calculation included California convictions that the State failed to prove were legally or factually comparable to Washington offenses, we remand for resentencing.

FACTS

John A. Jones III was convicted of second degree assault, aggravated by the presence of his minor child during the assault. The sentencing court found that Jones had an offender score of "at least 6" and imposed a 120-month exceptional sentence. On appeal, we affirmed his conviction but remanded for resentencing because the court did not properly determine Jones's offender score. Jones, 2010 WL 264998, at *1-3.

On resentencing, the State argued Jones's offender score was 7. This calculation included California convictions for one count of first degree murder and two counts of attempted first degree murder.[1] The court agreed with this offender score calculation and again imposed an exceptional sentence of 120 months. Jones appeals the exceptional sentence.

ANALYSIS

Jones argues the State failed to prove that his 1992 California convictions for first degree murder and attempted first degree murder are legally or factually comparable to Washington felonies. The State concedes the offenses are not legally comparable. But the State counters that it presented sufficient comparability information for the court to include Jones's California convictions in his offender score because the offenses were factually comparable.

"A defendant's offender score establishes the range a sentencing court may use

[1] The offender score calculation also included a 2000 California conviction for possession of narcotics/controlled substance. Jones does not challenge this offense's inclusion in his offender score on appeal.

in determining the sentence." State v. Thomas, 135 Wn. App. 474, 479, 144 P.3d 1178 (2006). In calculating the offender score, "[t]he sentencing court must include all current and prior convictions . . . ." Thomas, 135 Wn. App. at 479. If a defendant's prior convictions are from another state, the Sentencing Reform Act requires the trial court to classify the convictions "according to the comparable offense definitions and sentences provided by Washington law" before including them in the offender score. RCW 9.94A.525(3). The State must prove by a preponderance of the evidence that an out-of-state conviction is comparable to a Washington crime. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

To determine comparability, Washington courts apply a two-part test involving legal comparability and factual comparability. First, the sentencing court compares the elements of the out-of-state crime to the similar Washington criminal statute in effect when the out-of-state crime was committed. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are "substantially similar" or if the out-of-state crime is defined more narrowly than in Washington, the out-of-state conviction is included in the offender score. Lavery, 154 Wn.2d at 255. If the foreign crime is defined more broadly than the Washington crime, the court proceeds to the second part of the test to determine factual comparability. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). This requires the sentencing court to determine whether the defendant's conduct would have violated the comparable statute, as evidenced by the indictment, information, or records of the foreign conviction. Lavery, 154 Wn.2d at 255.

"While it may be necessary to look into the record of a foreign conviction to

determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison." Morley, 134 Wn.2d at 606. The court may examine only those documents that conclusively demonstrate that the relevant facts were proved to a jury beyond a reasonable doubt or admitted by the defendant in a guilty plea. Shepard v. United States, 544 U.S. 13, 21-26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005); Lavery, 154 Wn.2d at 258; State v. Bunting, 115 Wn. App. 135, 142-43, 61 P.3d 375 (2003). The sentencing court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Shepard, 544 U.S. at 16.

Jones argues that California's first degree murder and attempted first degree murder statutes are broader than Washington's murder and attempted murder statutes.[2] The State concedes that the California and Washington crimes at issue are not legally comparable.[3]

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[2] California Penal Code, section 187 defines "murder" as "the unlawful killing of a human being, or a fetus, with malice aforethought."

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice." CA Penal Code, § 188.

[3] The State concedes that under the California doctrine of provocative acts murder, the California murder statute is broader than Washington's murder statute in very limited circumstances.

Thus, we consider factual comparability and determine whether Jones's California conduct would have violated the relevant Washington criminal statutes. Jones argues that the State's documents are insufficient to prove his California first degree murder and attempted first degree murder convictions are comparable to the relevant Washington statutes. The State counters that under Washington law, the defendant's conduct constituted either intentional second degree murder or second degree felony murder. RCW 9A.32.050(1)(a),(b);[4] RCW 9A.08.020(2)(c);[5]

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[3] Neither party argues that California defines attempt more broadly. RCW 9A.28.020(1) states, "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." Therefore any difference for the attempted murder convictions must be based on the different definitions for murder.

[4] RCW 9A.32.050 provides:

"(1) A person is guilty of murder in the second degree when:

"(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

"(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

"(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

"(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

"(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

"(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

"(2) Murder in the second degree is a class A felony."

[5] RCW 9A.08.020 provides in relevant part:

"(1) A person is guilty of a crime if it is committed by the conduct of another person for

RCW 9A.08.020(3). To support this contention, the State relies on the California Transcript of the Change of Plea on April 8, 1992 ("plea colloquy") between the court and Jones's attorney. The State argues,

> In the plea colloquy the defendant's attorney told the court the factual basis to support the plea was in the p.x. report. The report provided with the transcript was the probation officer's report and recommendation. That report recounted the defendant's version of events as told to the police and the probation officer.

Resp't's Br. at 9 (emphasis added) (citations omitted). Jones counters that the factual basis relied on by the California sentencing court was a p.x. transcript,[6] not a p.x. report. Jones asserts that because this p.x. transcript is not in our record, there exists no factual basis from which we can conclude Jones's crimes are factually comparable.

The State mistakenly argues that in the plea colloquy, the defense attorney told

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which he [or she] is legally accountable.

"(2) A person is legally accountable for the conduct of another person when:

"(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he [or she] causes an innocent or irresponsible person to engage in such conduct; or

"(b) He [or she] is made accountable for the conduct of such other person by this title or by the law defining the crime; or

"(c) He [or she] is an accomplice of such other person in the commission of the crime.

"(3) A person is an accomplice of another person in the commission of a crime if:

"(a) With knowledge that it will promote or facilitate the commission of the crime, he [or she]:

"(i) Solicits, commands, encourages, or requests such other person to commit it; or

"(ii) Aids or agrees to aid such other person in planning or committing it; or

"(b) His [or her] conduct is expressly declared by law to establish his [or her] complicity."

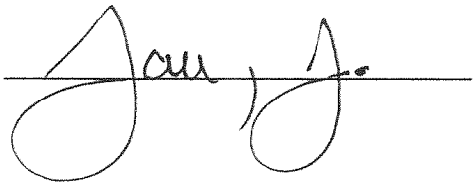
[6] Jones asserts, "In fact, the reference is to the transcript of the Preliminary Hearing, colloquially referred to as a 'P.X. Hearing.'" Appellant's Reply Br. at 2.

the court that the factual basis to support the plea was the p.x. report. The State also mistakenly implies that this is a reference to an included probation officer's report and recommendation ("probation report"). These contentions are demonstrably erroneous.

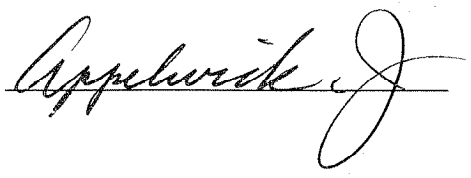
Our review of the record shows that during the plea colloquy, the court asked both the State and defense counsel for the basis of the plea. Both counsel stated on the record that the factual basis was the px transcript. But this transcript is not in our record. Jones entered his California pleas on April 8, 1992. The probation report states that the "referral date" was May, 6, 1992, and the "court date" was June 3, 1992. Therefore, the probation report was written after the plea colloquy and cannot be the "p.x. transcript" referred to by counsel. The facts in the probation report have not been proved beyond a reasonable doubt nor admitted by the defendant in his guilty plea. Our record fails to show whether Jones's conduct constituted intentional second degree murder or second degree felony murder under Washington law as the State contends. It is the State's burden to prove comparability of out-of-state offenses. The State failed to carry that burden.

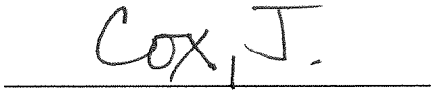
In the alternative, the State argues that even with an offender score of 1 instead of 7, the record is clear that the court would impose the same sentence and, therefore, remand is not necessary. "When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, 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). "We are hesitant to affirm an exceptional sentence where the standard range has been

incorrectly calculated because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus." Parker, 132 Wn.2d at 190. Here, the court's written findings of fact show it relied on the California murder and attempted murder convictions that the State failed to prove to justify the exceptional sentence. We remand for resentencing consistent with this opinion.[7]



WE CONCUR:





[7] Because we remand, we need not address Jones's argument that the court relied on other improper factors at sentencing.