IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL JAMES EPLETT, Appellant.	No. 41275-6-II PART PUBLISHED OPINION

Johanson, J. — Michael James Eplett appeals his jury trial conviction of attempted second degree child rape and his sentence. He argues that (1) the jury instruction defining "substantial step" was erroneous, (2) his trial counsel was ineffective for offering the defective jury instruction, (3) the trial court erred in failing to inquire into whether jurors saw him in restraints and in failing to immediately give a curative instruction, and (4) his federal court-martial for "carnal knowledge" should not have been included in his offender score because it was not legally or factually comparable to a Washington felony. We affirm his conviction but vacate his sentence and remand for resentencing.

FACTS

Following an undercover operation in which detectives posed online as a single mother seeking to prostitute herself and her 13-year-old daughter, the State charged Eplett with attempted second degree rape of a child.[1] Eplett was not visibly restrained in court during the

trial and he was wearing street clothes.

Following a recess on the second day of trial, Eplett moved for a mistrial, asserting that five jurors had recently observed a handcuffed Eplett in an elevator with two guards. A deputy confirmed that at least four jurors had seen Eplett in the elevator.

Concerned that questioning the jurors about what they may have seen would unnecessarily highlight the importance of "an inadvertent glimpse of the defendant by the jurors at the elevator," the trial court refused to question the jurors. 2 Verbatim Report of Proceedings (VRP) at 36. The trial court then denied the motion for mistrial, stating that the "mere fact that " jurors may have seen Eplett "in handcuffs accompanied by a transport officer" was not "per se prejudice[al]" and did not deny Eplett his right to a fair trial. 2 VRP at 37. The trial court also refused to question the jurors individually or in a group.

But the trial court offered to instruct the jury to disregard what it had seen and gave Eplett the option of it giving the curative instruction before the upcoming lunch break or with the final instructions. Although Eplett stated that he preferred that the trial court instruct the jury immediately rather than wait for the lunch break, the trial court did not give a cautionary instruction to the jury until it gave the jury its final instructions a short time later that same day. At that point, the trial court instructed the jury:

> The fact that there have been guards in the courtroom or you have seen the defendant restrained in any manner is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations.

[1] RCW 9A.28.020(1); RCW 9A.44.076.

CP at 71 (jury instruction 15).

The trial court also gave the jury the following instruction:

> A person commits the crime of attempted rape of a child in the second degree when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

CP at 61 (jury instruction 5). In addition, the trial court instructed the jury on the meaning of "substantial step":

> A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

CP at 63 (jury instruction 7). Both parties had proposed this instruction, which was based on WPIC 100.05.[2] The jury found Eplett guilty as charged.

At sentencing, the State presented evidence that Eplett had pleaded guilty to "carnal knowledge" under the Uniform Code of Military Justice (UCMJ) at a court-martial. *See* former 10 U.S.C. § 920 art. 120(b) (1996).[3] The State argued that the "carnal knowledge" offense was the equivalent of the Washington offense of third degree child rape.[4] The State[5] admitted that the "carnal knowledge" offense was "broader than" the Washington offense of third degree child rape, but it asserted that Eplett's stipulation established that the offense he committed was factually comparable. 2 VRP at 146-47. The State also submitted a "stipulation of fact," related

[2] 11A Washington Pattern Jury Instructions: Criminal 100.05, at 390 (3d ed. 2008) (WPIC).

[3] Eplett committed this offense in July 2006.

[4] RCW 9A.44.079.

[5] The court reporter misidentifies the speaker as defense counsel, but it is clear from the context that it was the prosecutor speaking. *See* 2 VRP at 146-47.

to the guilty plea, in which Eplett stipulated that he had engaged in sexual intercourse with a 15-year-old girl. Ex. 1 (all caps omitted). Eplett objected to admission of the State's court-martial documentation on the ground that the State had not proved that he was the person who had committed the prior offense; but he did not argue that the court-martial offense was not comparable to a Washington offense or, more specifically, that the State had failed to establish that he was at least 48 months older than the victim. The trial court found the "carnal knowledge" conviction comparable to the Washington offense and included it in Eplett's offender score.[6] Eplett appeals.

ANALYSIS

Jury Instruction Issue

Eplett argues that jury instruction 7 misstated the "substantial step" definition. Br. of Appellant at 7 (all caps omitted). He also argues that defense counsel provided ineffective assistance in proposing this instruction. These arguments fail.

Because Eplett proposed jury instruction 7, any instructional error was invited error, and Eplett cannot challenge the instruction directly on appeal, regardless of whether the alleged error is constitutional. *State v. Heddrick*, 166 Wn.2d 898, 909, 215 P.3d 201 (2009) (a party cannot set up an error and then claim such error on appeal even when the alleged error is of constitutional magnitude). But ineffective assistance of counsel claims resulting from instructional error are not precluded by invited error. *State v. Kyllo*, 166 Wn.2d 856, 861-62, 215 P.3d 177 (2009).

[6] Eplett did not have any additional criminal history.

> To prove ineffective assistance of counsel, Eplett must show:
>
> (1) defense counsel's representation was deficient i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Eplett fails to show that defense counsel's representation was deficient.

In *Kyllo*, our Supreme Court stated that, although it is not deficient performance for defense counsel to propose a "then-unquestioned WPIC," it can be deficient performance for defense counsel to propose a WPIC if cases existed at the time that "indicated to counsel that the pattern instruction was flawed." *Kyllo*, 166 Wn.2d at 866. Eplett argues that two decisions predating his trial, *Cronin*[7] and *Roberts*,[8] and the difference in language between the WPIC and the language in *Workman*,[9] should have alerted counsel to the possibility that WPIC 100.05 was flawed.

In *Cronin* and *Roberts*, our Supreme Court addressed erroneous accomplice liability jury instructions that would have allowed the jury to convict the defendants as accomplices had the defendant known his actions would promote *any* potential crime, rather than promote *the* charged crime. *Roberts*, 142 Wn.2d at 509-13; *Cronin*, 142 Wn.2d at 579-80. Eplett argues that jury instruction 7's reference to "a criminal purpose," would similarly allow the jury to find a

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[7] *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000).

[8] *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000).

[9] *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978).

substantial step if the evidence showed that he took a substantial step to commit *any* offense, not just the charged offense and that defense counsel should have been aware of this flaw because of *Roberts* and *Cronin*. Br. of Appellant at 9; CP at 63.

In *Workman*, our Supreme Court held that "it would be proper for a trial court to include in its instruction to a jury on the crime of attempt the qualifying statement that in order for conduct to be a substantial step it must be *strongly corroborative of the actor's criminal purpose*." *Workman*, 90 Wn.2d at 452 (emphasis added). Eplett argues that jury instruction 7's use of the phrase "indicates a criminal purpose" rather than "corroborative of the actor's criminal purpose" relieved the State of having to prove "that intent be established by independent proof and corroborated by the accused's conduct." Br. of Appellant at 9.

Regardless of *Roberts* and *Cronin* and the language difference between WPIC 100.05 and *Workman*, Eplett's arguments are flawed because Eplett reads jury instruction 7 in isolation. It is well settled that we must read jury instructions together, as a whole. *State v. Teal*, 117 Wn. App. 831, 837, 73 P.3d 402 (2003) (citing *State v. Haack*, 88 Wn. App. 423, 427, 958 P.2d 1001 (1997), *review denied*, 134 Wn.2d 1016 (1998)), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004). And when read with jury instruction 5, which provides, "A person commits the crime of attempted rape of a child in the second degree when, with intent to commit that crime, he or she does any act that is a substantial step *toward the commission of that crime*," the two instructions clearly require the jury to find that there was evidence demonstrating that Eplett took a substantial step toward committing *the charged offense*. CP at 61 (emphasis added). Because the instructions, read as a whole are sufficient, Eplett does not establish that defense counsel's

performance was deficient when he proposed jury instruction 7, and his ineffective assistance of counsel argument fails.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Restraint Issue

Eplett next argues that the trial court violated his Fourteenth Amendment due process rights when it refused to inquire into the allegation that several jurors had seen him in handcuffs while escorted by guards and when it refused to immediately admonish the jurors regarding their observations. We disagree.

> A jury's brief or inadvertent glimpse of a defendant in restraints inside or outside the courtroom does not necessarily constitute reversible error. Such circumstances are not inherently or presumptively prejudicial and do not rise to the level of a due process violation absent a showing of actual prejudice.

In re Pers. Restraint of Davis, 152 Wn.2d 647, 697-98, 101 P.3d 1 (2004) (citing *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001)); *see also In re Pers. Restraint of Crace*, 157 Wn. App. 81, 103, 236 P.3d 914 (2010), *review granted*, 171 Wn.2d 1035 (2011). Given that Eplett was not in restraints in the courtroom, that the jurors' potential viewing of him in handcuffs was fleeting at best, that the trial court later instructed the jury not to consider the fact Eplett may have been in restraints, and that we presume a jury follows the trial court's instruction,[10] Eplett fails to establish the necessary prejudice and this argument fails.

[10] *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).

Offender Score

Finally, Eplett argues that the State failed to prove the existence and comparability of the "carnal knowledge" offense to third degree child rape under Washington law and, therefore, erroneously included the foreign offense in his offender score. Specifically, Eplett argues that the elements of the "carnal knowledge" offense were not comparable to any Washington offense and that the "carnal knowledge" offense did not require that he be 48 months older than the victim at the time of the offense, so the offense was not factually comparable to third degree child rape under Washington law. Br. of Appellant at 21-22. We agree.

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, 111 P.3d 837 (2005). To determine whether a foreign offense is comparable to a Washington offense, we first look to the elements of the crime. *Lavery*, 154 Wn.2d at 255 (citing *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998)). We compare the elements of the foreign offense to the elements of a Washington criminal statute in effect when the defendant committed the foreign offense. *Lavery*, 154 Wn.2d at 255 (citing *Morley*, 134 Wn.2d at 606). If the foreign offense is broader than the Washington offense,[11] we must consider whether the foreign offense was factually comparable "by determining whether the defendant's conduct would have violated a Washington statute." *State v. Jordan*, 158 Wn. App. 297, 300, 241 P.3d 464 (2010) (citing *Morley*, 134 Wn.2d at 606).

Eplett is correct that "carnal knowledge" under the UCMJ is not legally comparable to third degree rape of a child under Washington law. At the time of the offense, "carnal

[11] We note that the State admitted that the "carnal knowledge" offense was "broader" than the Washington offense. 2 VRP at 146-47.

knowledge" was defined as follows:

> Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—
> (1) who is not that person's spouse; and
> (2) who has not attained the age of sixteen years;
> is guilty of carnal knowledge and shall be punished as a court-martial may direct.

Former 10 U.S.C. § 920 art. 120(b). RCW 9A.44.079(1) defines third degree child rape as follows:

> A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator *and the perpetrator is at least forty-eight months older than the victim.*

(Emphasis added). Because "carnal knowledge" does not have a lower age limit for the victim and does not require that the defendant be at least 48 months older than the victim, "carnal knowledge" is broader than the Washington offense.

A conviction is factually comparable if the defendant's conduct would have violated a comparable Washington statute. *Lavery*, 154 Wn.2d at 255. Although the court-martial records show that Eplett stipulated that the victim was 15 years old at the time of the intercourse, these records do not state that Eplett was at least 48 months older than the victim at the time of the offense; nor do they otherwise indicate Eplett's birth date. The State presented a certified copy of Eplett's driver's license at trial, which, when considered in conjunction with the victim's birth date in the court-martial record, established that Eplett was 54 months older than the victim at the time of the offense. The State argues the trial court properly considered facts outside of the court-martial record (namely Eplett's birth date on his driver's license) to establish Eplett's age at the

time of the carnal knowledge offense was committed. But the State cites no authority for this position. In contrast, Eplett argues that neither the comparability statute (RCW 9.94A.525(3)[12]) nor *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999), authorizes a sentencing court to look to facts outside the record of conviction to establish a missing element when evaluating comparability.

Eplett is correct. Neither the statute nor *Ford* suggests that the State can rely on facts outside the record of the foreign conviction to establish comparability to a Washington offense. On the contrary, our review of case law strongly suggests that the trial court's review of the factual prong of the comparability analysis is limited to those facts established in relation to the foreign conviction alone. *See State v. Collins*, 144 Wn. App. 547, 182 P.3d 1016 (2008) (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998) (factual comparison is based on records of foreign conviction), *review denied*, 165 Wn.2d 1032 (2009); *State v. Farnsworth*, 133 Wn. App. 1, 18, 130 P.3d 389 (2006) (facts supporting foreign conviction must have been admitted to or stipulated to or proved to finder of fact in foreign jurisdiction), *remanded*, 159 Wn.2d 1004, 151 P.3d 976 (2007)); *see also Lavery*, 154 Wn.2d at 258 ("Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated

[12] RCW 9.94A.525(3) provides:

> Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic."). Accordingly, the trial court improperly concluded that in this case, "carnal knowledge" under the UCMJ was factually comparable to third degree child rape under Washington law.

We affirm the conviction, but vacate the sentence and remand for resentencing. Because Eplett did not argue below that the court-martial offense was not comparable to a Washington felony or that the State had failed to prove the age-difference element, on remand the State may present additional "evidence to support the proper classification of the disputed conviction." *Ford*, 137 Wn.2d at 485-86.

Johanson, J.

We concur:

Armstrong, P.J.

Hunt, J.