COA NO. 44911-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

GENARO VILLANUEVA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael H. Evans, Judge

AMENDED BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to omit washed out prior class C felonies from the offender score under RCW 9.94A.525(2)(c).

2. The court erred in computing appellant's offender score by including a non-comparable out-of-state conviction.

3. Appellant received ineffective assistance of counsel at sentencing, in violation of the Sixth Amendment to the United States Constitution.

Issues Pertaining to Assignments of Error

1. Whether the court erred by including prior class C felonies in appellant's offender score where appellant spent more than five continuous years in the community without committing any offense resulting in a conviction?

2. Whether the State failed to prove appellant's prior Texas offense of "burglary of a habitation" was comparable to a Washington felony, requiring reduction of the offender score and remand for resentencing?

3. In the alternative, whether trial counsel provided ineffective assistance at sentencing in affirmatively agreeing to the erroneous comparability determination for the Texas burglary offense?

B. STATEMENT OF THE CASE

The State charged Genaro Villanueva with second degree burglary, second degree theft and forgery. CP 4-5. A jury convicted on all counts. CP 37-39. Rejecting the defense argument that prior class C felony convictions washed out from the offender score and that prior out of state offenses were incomparable, the court imposed a total sentence of 62 months confinement. CP 48; 1RP[1] 283-87. This appeal follows. CP 56.

C. ARGUMENT

1. THE OFFENDER SCORE ERRONEOUSLY INCLUDED WASHED OUT PRIOR CONVICTIONS.

Villanueva's prior class C felony convictions washed out and cannot be included in his offender score because he committed no crimes resulting in conviction for a five year period while in the community since his last release from confinement. His case must be remanded for resentencing with a reduced offender score.

Offender score calculations are reviewed de novo. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010), review granted and remanded on other grounds, 172 Wn.2d 1009, 260 P.3d 208 (2011). RCW

[1] The verbatim report of proceedings is referenced as follows: 1RP - two consecutively paginated volumes consisting of 4/9/13, 4/10/13, 4/11/13 and 5/16/13; 2RP - 5/2/13.

9.94A.525(2)(c) governs when class C felony convictions may be included in the offender score. That statute provides, in relevant part:

> class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).[2]

The statute contains a "trigger" clause, which identifies the beginning of the five-year period, and a "continuity/interruption" clause, which sets forth the substantive requirements a person must satisfy during the five-year period. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Any offense committed after the trigger date that results in a conviction resets the five-year clock. Ervin, 169 Wn.2d at 821. The State bears the burden of proving prior criminal history for the purpose of calculating the offender score under the wash out provision. Cross, 156 Wn. App. at 586-87; In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 875-76, 880, 123 P.3d 456 (2005).

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[2] The current version of the statute is identical in relevant respect to the prior version of the statute in effect when the current offenses were committed. Laws of 2011, ch. 166 § 3 (eff. July 22, 2011). This brief therefore cites to RCW 9.94A.525(2)(c).

Villanueva's criminal history includes (1) "burglary of a habitation" (date of crime 4/27/00); (2) taking a motor vehicle without permission (TMVWP) (date of crime 2/24/99); (3) attempted larceny (date of crime 3/19/96); (4) first degree burglary (date of crime 6/24/04); and (5) second degree theft (date of crime 8/20/04). CP 44.

The TMVWP, attempted larceny, and "burglary of a habitation" are convictions for out-of state crimes. CP 44. For the purpose of computing the offender score, the court found the TMVWP comparable to the Washington crime of second degree TMVWP and the attempted larceny comparable to the Washington crime of first degree attempted theft.[3] 1RP 276-77.

Attempted first degree theft is a class C felony. RCW 9A.28.020(3)(c) (an attempt to commit a crime is a Class C felony when the crime attempted is a class B felony); RCW 9A.56.030(2) (first degree theft is class B felony). Second degree TMVWP and second degree theft are also class C felonies. RCW 9A.56.075(2); RCW 9A.56.040(2).

The issue is whether those three prior class C felonies washed out under RCW 9.94A.525(2)(c) because Villanueva spent five years in the

[3] The court also found the Texas conviction for "burglary of a habitation" to be comparable to the Washington crime of residential burglary. RP 273. That offense is not at issue in relation to the wash out argument.

community "since the last date of release from confinement" without committing any new crime that resulted in conviction.

The State initially claimed Villanueva was released from prison in 2009 on his 2004 burglary and theft convictions out of Lewis County. CP 62; 2RP 10. But Villanueva received a 41 month sentence of confinement on those convictions and he was sentenced on August 20, 2004. CP 7; Sentence Ex. 3. The numbers don't add up. He could not have been released as late as 2009.

At the May 16 sentencing hearing, defense counsel notified the court that, according to the DOC, Villanueva was actually released from confinement on November 27, 2006. 1RP 284. Defense counsel argued Villanueva's prior class C felonies should wash out because he did not commit another offense resulting in a conviction until committing the current offenses in 2013 — a period longer than five years. 1RP 285.

The State acknowledged Villanueva was actually released from the penitentiary in 2006, but pointed out Villanueva was on community custody for three years until August 4, 2009. 1RP 286. The State argued the "last date of release" referenced in the wash out statute meant release from DOC supervision requirements, i.e., the completion of community custody. 1RP 286-87. From this premise, the State maintained there was no five-year wash out period because Villanueva's community custody

term ended in 2009 and he was convicted for his current offenses in 2013. 1RP 286-87. The court agreed with the State's position: "2013. So that's a four year period. So I think there isn't a washing there." 1RP 287.

The court misinterpreted what "the last date of release from confinement" means in RCW 9.94A.525(2)(c). A sentencing court's statutory authority under the Sentencing Reform Act is a question of law reviewed de novo. State v. Mann, 146 Wn. App. 349, 357, 189 P.3d 843 (2008), review denied, 169 Wn.2d 1018, 238 P.3d 502 (2010). Statutory interpretation is also a question of law reviewed de novo. Ervin, 169 Wn.2d at 820. When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Under the Sentencing Reform Act, "confinement" means "total or partial confinement." RCW 9.94A.030(8). "Total confinement" means confinement inside the physical boundaries of a state facility 24 hours a day. RCW 9.94A.030(51). "Partial confinement" means confinement for one year or less in a state facility for a substantial portion of each day, or, if home detention or work crew has been ordered, confinement in an approved residence for a substantial portion of each day. RCW 9.94A.030(35).

Villanueva was released from prison in 2006. 1RP 284, 286. November 27, 2006 was his last date of confinement. 1RP 284. He began to serve his term of community custody following his release from prison. The court erred in treating release from community supervision as equivalent to release from confinement under RCW 9.94A.525(2)(c).

"Community custody is plainly not confinement." State v. Gartrell, 138 Wn. App. 787, 790, 158 P.3d 636 (2007). "Community custody is a portion of an offender's sentence that is served in the community." State v. Crawford, 164 Wn. App. 617, 619, 267 P.3d 365 (2011); accord State v. Jones, 172 Wn.2d 236, 244, 257 P.3d 616 (2011); State v. Donaghe, 172 Wn.2d 253, 265, 256 P.3d 1171 (2011); see RCW 9.94A.030(5) ("'Community custody' means that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.").

The wash out statute requires the offender to spend "five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c). Villanueva did just that. His term of community custody does not count against the five years he spent in the community without committing a crime resulting in conviction. The five year clock began to run when he was released

from confinement in 2006, not when he finished his community custody term in 2009.

Villanueva's prior class C felonies washed out and should not have been included in his offender score because he did not commit any crime resulting in a conviction for a period of five years in the community. "[A] conviction that has washed out is not relevant to the calculation of an offender score." State v. Moeurn, 170 Wn.2d 169, 176, 240 P.3d 1158 (2010). The three prior class C felony convictions were improperly included in Villanueva's offender score, resulting in the erroneous addition of three points to each of the current offenses and increased standard ranges. CP 44-45; see RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of III for second degree burglary; I for second degree theft and forgery); RCW 9.94A.525(7) (prior non-violent felonies count as one point where present conviction is for non-violent offense). This case must be remanded for resentencing because the prior class C felonies washed out under RCW 9.94A.525(2)(c) and should not have been included in Villanueva's offender score.

2. THE STATE DID NOT PROVE THE PRIOR TEXAS OFFENSE WAS COMPARABLE TO A WASHINGTON OFFENSE FOR THE PURPOSE OF COMPUTING THE OFFENDER SCORE.

The court at sentencing counted a prior Texas offense of "burglary of a habitation" as contributing to Villanueva's offender score. CP 44-45; 1RP 273, 277. This was error. The State did not prove the Texas offense was legally or factually comparable to a Washington felony offense. The Texas offense should therefore have been omitted from the offender score. If defense counsel is found to have waived the issue by affirmatively agreeing to the comparability finding, then Villanueva received ineffective assistance of counsel. Either way, the error merits relief.

a. The Texas Burglary Conviction Is Not Legally Or Factually Comparable To A Washington Felony Offense.

In computing the offender score, "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The prosecution bears the burden of proving the comparability of out-of-state convictions. Cadwallader, 155 Wn.2d at 876. "Absent a sufficient record, the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine

whether the convictions are properly included in the offender score." State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999).

The comparability of out-of-state convictions to Washington crimes is a question of law reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 97 P.2d 941 (2000). First, it must be determined whether the foreign offense is legally comparable. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The trial court must compare the elements of the out-of-state crime with the elements of potentially comparable Washington crimes as defined on the date the out-of-state crime was committed. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Offenses are not legally comparable if the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute. Ford, 137 Wn.2d at 479; Lavery, 154 Wn.2d at 255-56. If the foreign offense's elements are broader or different than Washington's elements, precluding legal comparability, it must then be determined whether the offense is factually comparable. Thiefault, 160 Wn.2d at 415.

The State argued Villanueva's Texas conviction for "burglary of a habitation" was comparable to the Washington offense of residential burglary. 1RP 266. The trial court agreed. 1RP 277. Both are wrong.

The Texas offense is not legally or factually comparable to a Washington felony offense.

The Texas paperwork submitted by the State shows Villanueva pled guilty to the charged crime of "burglary of a habitation." Sentence Ex. 3. The indictment alleged Villanueva, on April 27, 2000, "did unlawfully, intentionally and knowingly enter a habitation without the effective consent of Steve Ventura, the owner thereof, with the intent to commit theft, and further, said defendant did intentionally and knowingly enter a habitation without the effective consent of Steve Ventura, the owner therefore, and did then and there commit and attempt to commit theft[.]" Sentence Ex. 3.

The Texas of offense of "burglary of a habitation" is found at V.T.C.A., Penal Code § 30.02:

> (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

From the indictment, it is clear that Villanueva pled guilty to violating V.T.C.A., Penal Code § 30.02(a)(1) and (3). The crucial question for Villanueva's appeal is what constitutes a "habitation" under Texas law. The Texas statute defines "habitation" as "a structure *or vehicle* that is adapted for the overnight accommodation of persons, and includes: (A) each separately secured or occupied portion of the structure or vehicle; and (B) each structure appurtenant to or connected with the structure or vehicle." V.T.C.A., Penal Code § 30.01(1) (emphasis added).[4]

A person is guilty of residential burglary under Washington law "if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling *other than a vehicle*." Former RCW 9A.52.025(1) (Laws of 1989, 2nd ex.s. ch. 1 § 1) (emphasis added).[5] Similarly, a person is guilty of second degree burglary under

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[4] "Building," meanwhile, is defined as "any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use." V.T.C.A., Penal Code § 30.01(2). "Vehicle" is defined as "any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, *except such devices as are classified as 'habitation.'*" V.T.C.A., Penal Code § 30.01(3) (emphasis added). This definition of "vehicle" is relevant to the separate crime of "burglary of vehicles" where the vehicle is not used as a "habitation." V.T.C.A., Penal Code § 30.04. Wade v. State, 833 S.W.2d 324, 325-26 (Tex. Ct. App. 1992).

[5] Washington law defines "dwelling" as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging[.]" RCW 9A.04.110(7).

Washington law "if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building *other than a vehicle* or a dwelling." Former RCW 9A.52.030(1) (Laws of 1989 2nd ex.s. ch. 1 § 2) (emphasis added).

The Texas offense of "burglary of a habitation" under V.T.C.A., Penal Code § 30.02(a)(1) or (3) is not legally comparable to the Washington offenses of residential burglary or second degree burglary because those Washington offenses exclude vehicles. The Texas statute is broader than those Washington statutes because it includes burglary of a vehicle. An out-of-state offense that is broader than a Washington offense is not legally comparable. Ford, 137 Wn.2d at 479; Lavery, 154 Wn.2d at 255-56.

Nor is the Texas offense legally comparable to any other Washington felony offense. Under Former RCW 9A.52.095(1) (Laws of 1982, 1st ex.s. ch. 47 § 13), a person is guilty of first degree vehicle prowling "if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a motor home, as defined in RCW 46.04.305, or in a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed

sleeping quarters or cooking facilities."[6] First degree vehicle prowling is a class C felony. Former RCW 9A.52.095(2) (1982).

The Texas "burglary of a habitation" offense remains broader than first degree vehicle prowling under Washington law because the Texas offense encompasses entry into any vehicle "that is adapted for the overnight accommodation of persons used." V.T.C.A., Penal Code §§ 30.01(1), 30.02(a)(1) and (3). First degree vehicle prowling is narrower because it limits entry to certain kinds of vehicles used for lodging: "a motor home, as defined in RCW 46.04.305, or in a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities." Former RCW 9A.52.095(1).

To enter any *other* vehicle with intent to commit a crime constitutes the offense of second degree vehicle prowling under former RCW 9A.52.100(1) (Laws of 1982, 1st ex.s. ch. 47 § 14): "A person is guilty of vehicle prowling in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains

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[6] "Motor homes" are defined as "motor vehicles originally designed, reconstructed, or permanently altered to provide facilities for human habitation, which include lodging and cooking or sewage disposal, and is enclosed within a solid body shell with the vehicle, but excludes a camper or like unit constructed separately and affixed to a motor vehicle." Former RCW 46.04.305 (Laws of 1990, ch. 250 § 19).

unlawfully in a vehicle other than a motor home, as defined in RCW 46.04.305, or a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities."

Second degree vehicle prowling, however, is only a gross misdemeanor. Former RCW 9A.52.100(2) (1982). Misdemeanor offenses other than serious traffic offenses and repetitive domestic violence offenses do not count toward the offender score. RCW 9.94A.525(2). An out-of-state offense that is only comparable to a Washington misdemeanor offense is not comparable for purposes of computing the offender score. State v. McCorkle, 88 Wn. App. 485, 498, 945 P.2d 736 (1997), aff'd, 137 Wn.2d 490, 973 P.2d 461 (1999); State v. Weiand, 66 Wn. App. 29, 32, 831 P.2d 749 (1992) (if there is a comparable offense, the court must determine whether it is a class A, B, or C felony). The Texas offense is not legally comparable to a Washington felony offense.

If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, the court then determines whether the offenses are factually comparable. Ford, 137 Wn.2d at 479; Lavery, 154 Wn.2d at 255-56. In assessing factual comparability, the court may look at the facts underlying the prior

conviction to determine if the defendant's conduct would have resulted in a conviction in Washington. Lavery, 154 Wn.2d at 255.

"In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." Thiefault, 160 Wn.2d at 415. An admission in a plea statement, a plea colloquy where a defendant admits facts, the to-convict instruction and jury verdict in a jury trial, or the trial court's findings of facts in a bench trial can establish such facts. Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 1262, 161 L. Ed. 2d 205 (2005). The State carries the burden of providing a certified copy of the judgment or comparable documents of record or transcripts of prior proceedings. State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002).

The Texas paperwork admitted as an exhibit for sentencing purposes sets forth no underlying facts of the crime. It simply reflects the general statutory language of the "burglary of a habitation" offense. Sentence Ex. 3. There is no way to determine whether Villanueva burgled a dwelling other than a vehicle. The Texas offense is therefore not factually comparable to Washington's residential burglary or second degree burglary. There is no way of telling whether Villanueva entered, with intent to commit a crime, a motor home or vessel permanently equipped sleeping quarters or cooking facilities. The Texas offense is

therefore not factually comparable to the Washington felony offense of first degree vehicle prowling. Courts "cannot assume the existence of facts that are not in the record." State v. Werneth, 147 Wn. App. 549, 555, 197 P.3d 1195 (2008). Even where the record shows a defendant admitted to all the underlying facts in the indictment, the court is prohibited from drawing inferences drawn from those facts in determining comparability. State v. Larkins, 147 Wn. App. 858, 865-66, 199 P.3d 441 (2008).

The State did not meet its burden of establishing comparability. The Texas burglary cannot contribute to Villanueva's offender score. The remedy is vacature of Villanueva's sentence and remand for resentencing using a correct offender score. State v. Thomas, 135 Wn. App. 474, 488, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007).

b. In The Alternative, Defense Counsel Provided Ineffective Assistance In Agreeing To The Comparability Of The Texas Offense.

At the initial sentencing hearing on May 2, defense counsel made it known that he challenged the comparability of out-of-state offenses. 2RP 11. When asked if he contested comparability, counsel responded "Yes, contesting comparability on the one remaining elude, which apparently is . . . 2000 . . . And the [tem va] (phonetic) from McKinley, New Mexico, and the larceny from Gallup, New Mexico. I've looked at the Dallas

judgment for residential burglary, and it appears to actually talk about burglary." 2RP 11. Sentencing was continued get more information on the comparability issue. 2RP 11-12.

At the ensuing May 16 sentencing hearing and in a sentencing memorandum, the prosecutor presented his comparability argument on the premise that defense counsel challenged the comparability of all out-of-state offenses, including the Texas burglary. 1RP 265-66; CP 61-62. Defense counsel wanted clarification on which offenses the State intended to use as criminal history. 1RP 268. In the course of doing that, counsel stated "I misspoke last time when I said that the Texas burglary looked okay to me." 1RP 268. Counsel then went on to argue that the Texas judgments did not actually show Villanueva was the person who was actually convicted of those prior crimes. 1RP 268. Counsel did not further argue the comparability issue. After the attorneys finished their arguments, the court ruled a number of out of state offenses were comparable, including the Texas burglary offense. 1RP 275-77.

Under some circumstances, defense counsel's affirmative agreement to the comparability of an out-of-state offense relieves the State of its burden of proving comparability. State v. Lucero, 168 Wn.2d 785,788-89, 230 P.3d 165 (2010); State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004); Thomas, 135 Wn. App. at 487-88. This record does not

show defense counsel affirmatively agreed to the inclusion of the Texas burglary in terms of comparability. Indeed, the prosecutor argued the comparability of the Texas burglary conviction on its merits and the trial court ruled that offense was comparable without reference to any agreement made by defense counsel. 1RP 265-66, 277.

But if Villanueva's trial counsel is deemed to have affirmatively agreed to the inclusion of the Texas "burglary of a habitation" conviction as a comparable offense, then counsel provided ineffective assistance. Every criminal defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

While any objection to an out-of-state conviction's inclusion may be waived by affirmative acknowledgement that it was properly included, it is ineffective assistance of counsel to make such an acknowledgment

when the foreign conviction is not legally comparable and the State has failed to prove factual comparability.

In Thiefault, the Supreme Court held defense counsel provided ineffective assistance of counsel by failing to object to the sentencing court's erroneous determination that a Montana conviction was comparable. Thiefault, 160 Wn.2d at 412, 417. Defense counsel's failure to object was deficient because the Montana attempted robbery statute is broader than its Washington counterpart and the record contained insufficient documentation to establish the Montana conviction was factually comparable. Id. at 417. Counsel's deficient performance was prejudicial because "[a]lthough the State may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable[.]" Id.

As in Thiefault, the out-of-state statute under which Villanueva was convicted is broader than its Washington counterpart and the record does not establish the Texas offense was factually comparable. Any agreement by Villanueva's counsel that the Texas conviction is a comparable offense was therefore deficient.

Defense counsel's deficient performance in relation to comparability was also prejudicial. The sentencing hearing already had been continued once to enable the State to meet its burden on proving comparability. CP 57; 2RP 11-12. The State had already obtained all the documentation it could to prove the prior crimes. CP 57-62. The State argued on the premise that defense counsel did not agree to the comparability of the Texas offense or any others. 1RP 265-66. The trial court ruled on comparability without reference to any defense agreement. 1RP 277. Under these circumstances, Villanueva requests remand for resentencing without inclusion of the Texas burglary. If this Court disagrees, then the alternative remedy is remand so that the trial court can conduct a factual comparability analysis of the Texas conviction. Thiefault, 160 Wn.2d at 417.

D. CONCLUSION

For the reasons set forth, Villanueva respectfully requests that this Court remand for resentencing based on a properly calculated offender score that does not include the prior class C felony convictions and the Texas burglary offense.

DATED this 14th day of January 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 44911-1-II
	)	
GENARO VILLANUEVA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GENARO VILLANUEVA
DOC NO. 874959
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF JANUARY, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

January 14, 2014 - 2:23 PM

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Court of Appeals Case Number: 44911-1

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