

No. 39954-7-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
19 JUN 17 PM 3:41
STATE OF WASHINGTON
CLERK

STATE OF WASHINGTON,

Respondent,

vs.

DAVID MOSTELLER

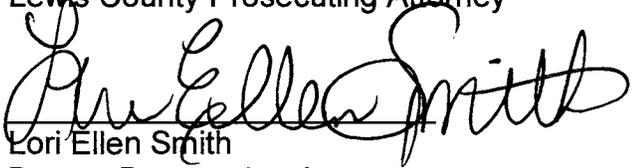
Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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01-01-0 1117

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STATEMENT OF THE CASE

David Mosteller has a very long history of mental illness, with many admissions to Western State Hospital (WSH), and a very long history of criminal conduct, together with a history of refusing to take anti-psychotic medications. Supp. CP 110,111, 119; Supp. CP 90-139 (reports from WSH). Mosteller's documented criminal history appears to begin in 1978, and includes much assaultive conduct, trespassing, disorderly conduct, and stalking, including a conviction for Assault in the Second Degree in 2003. Supp CP 110,111; CP 20-21; CP 11-19.

Mosteller's first admission to Western State Hospital was in February 1983, when he was admitted on a "grave disability" petition. Supp. CP 114. At that time, Mosteller was diagnosed as having Schizophrenia, Paranoid Type. Id. Mosteller was admitted again to WSH in 1988, when he was admitted to determine his competency to stand trial. Supp. CP 114. Mosteller was admitted to WSH again in 1989 for "concerning behavior in the community." Supp. CP 115. In June of 1997, Mosteller was admitted to WSH for an evaluation of his competency to stand trial. During the evaluation, Mosteller admitted to a history of drug use that included crank, marijuana, cocaine, heroin, LSD, PCP and alcohol. Supp.

CP 115. In October of 1998, Mosteller was sent to WSH on a 72 hour detention from Lewis County, after Mosteller was found wandering naked in the community, and community members alleged he had shown inappropriate sexual interest or lewd behavior towards children. Supp. CP 115. Mosteller's diagnosis at that time was Schizophrenia, Chronic Paranoid Type, Recurrent and Polysubstance Abuse. Supp. CP 115.

In October or November of 2000, Mosteller was again admitted to WSH for a competency evaluation. He was found incompetent to stand trial and returned to WSH for restoration of competency. Supp. CP 115. WSH recommended that Mosteller be civilly committed. Supp. CP 115. Mosteller was then committed to WSH on a 90 day competency restoration order. Supp. CP 115. Competency was restored. Id. In June of 2001, Mosteller again returned to WSH to determine his competency to stand trial, and was found competent. Supp. RP 115. In March 2003, another evaluation of Mosteller was requested by Cowlitz County. Supp. CP 115. When the evaluator went to the Cowlitz County jail to interview Mosteller, Mosteller refused the interview and was admitted to WSH on April 23, 2003. Supp. CP 115. Mosteller was evaluated and diagnosed with Schizophrenia, Paranoid Type and

Partial Remission and Personality Disorder Not Otherwise Specified, and Mosteller was found competent to stand trial. Supp. CP 115. In July of 2005, Mosteller was admitted to WSH for a competency evaluation, and was found incompetent. Supp. CP 116. Mosteller was returned to WSH for competency restoration and was restored to competency. Supp. CP 116.

On April 5, 2006, in the Pierce County jail, Mosteller assaulted a correctional officer by throwing his tray and sport at the officer. Supp. CP 116. When backup was called to assist, Mosteller threatened to "kick their asses and kill them." Supp. CP 116. On April 11, 2006, Mosteller was seen by a psychiatrist who prescribed Zyprexa, though noting that Mosteller was likely to refuse to take the medication. Supp. CP 116. On May 15, 2006, Mosteller continued to refuse his medications. Supp. CP 116. Upon being found incompetent to stand trial, Mosteller was admitted to WSH on June 9, 2006, for competency restoration. Supp. CP 117. Mosteller was discharged from WSH on January 3, 2007. On January 30, 2007, Mosteller was readmitted to WSH after being found incompetent to stand trial, and was civilly committed to WSH. Supp. CP 117. Mosteller remained at WSH and was transferred to a program for living skills on WSH grounds

on August 6, 2007. Supp. CP 117. Mosteller was set to gradually transition to the community, but he left without staff permission on August 24, 2007. Supp. CP 117. Mosteller never returned at that point and on September 12, 2007, he was "fully discharged" from WSH. Supp. CP 117. On December 26, 2007, Mosteller was civilly committed from Pierce County for 180 days of involuntary treatment at WSH. At that time, Mosteller was psychotic, delusional and agitated. Supp. CP 118. Mosteller became loud and threatening to peers, but became more appropriate and his psychotic symptoms subsided with administration of antipsychotic medications. Supp. CP 118. With adjustments to his medications, Mosteller continued to improve and was given ground privileges and left WSH on an unauthorized leave on March 8, 2008. Mosteller did not return for several days, and when he did, he was disheveled and visibly exhausted. Supp. CP 118. After receiving medication, Mosteller displayed no active symptoms of psychosis and was discharged from WSH into the care of Cascade Mental Health hospital diversion program on April 25, 2008. However, on April 25, 2008, Mosteller left the hospital diversion program against staff advice. Supp. CP 118. Mosteller soon stopped taking his medications and

wound up in the Cowlitz County jail on May 8, 2008. Supp. CP 118.

Mosteller's current conviction stems from an incident in Lewis County on November 24, 2008. On that date, police were called to the Starbucks establishment in Chehalis, for a report of a "suspicious person." Supp. CP 113. The store manager called 911 because Mosteller was inside the Starbucks bothering customers, moving from table to table and saying obscene things. RP 9. Mosteller was asked to leave the Starbucks store, so Mosteller went outside and sat at a table outside the store. RP 10. Once outside, Mosteller continued to bother patrons who were outside, "harassing them and touching their belongings." RP 10,11, 33,34. Mosteller went back inside the store and threw his coffee cup into one of Starbucks' display baskets. RP 20,21. As Mosteller was walking out the door to leave, he was met by a police officer, who indicated he wanted to speak to Mosteller. RP 21. When the officer put his hand up to motion for Mosteller to wait a minute, Mosteller began swinging at the officer. RP 21,22. Mosteller hit the officer in the jaw. RP 78. A scuffle ensued, and a display case was knocked over in the store and items fell to the floor and broke. RP 24,35,36,37,38,45, 78. With assistance from some patrons in the

Starbucks, Mosteller was subdued and handcuffed. RP 24,58. Mosteller was charged with one count of Assault in the Third Degree and one count of Criminal Trespass in the First Degree. CP 56-58.

Mosteller was sent to WSH for an initial competency evaluation pursuant to an order entered by the court on January 22, 2009. CP 46-52. In a report dated February 2, 2009, WSH found Mosteller incompetent to stand trial, and said he could be rendered competent with medication, that there was no less restrictive method to achieve competency, and requested that the trial court give WSH doctors the authority to medicate Mosteller without his consent if he refused to take the medication (as was his history). Supp. CP 119,120.

In In a pre-trial court hearing held on February 12, 2009, with Mosteller present and represented by counsel, the prosecutor explained that WSH found Mosteller incompetent, and that the State had "discussed this with counsel" and requested that the court enter an order committing Mosteller to WSH to restore competency. 2/12/09 RP 3. The order contained a provision to medicate Mosteller without his consent "if necessary." Id.; CP 43-45. The following exchange took place at this hearing:

PROSECUTOR: Western State did send back a report dated February 9, 2009 in which it was the opinion of the doctor that did the review that Mr. Mosteller is not competent to stand trial. I've discussed this with counsel. I prepared an order of commitment to Western State for 90 days to restore competency. Included in there is a provision as suggested by the report that any medications be administered without consent if necessary.

DEFENSE: . . . I have got the report from Western State Hospital and have reviewed it. I understand that under the statute the prosecutor has the right to request he be sent back up there. For the record, Mr. Mosteller has been up there numerous times, has not worked that well in the past, but I think the court has enough discretion to go ahead and recommit [sic].

PROSECUTOR: Review date?

COURT: Well, it is a 90-day commitment, so May 7. I signed the order. Strike the trial date for next week.

2/12/09 RP 3,4 (emphasis added). There was no objection to this order, or the provision to medicate without consent, by either Mosteller himself, or his counsel. Id. The order was signed by Mosteller's counsel. CP 43-45. In a report dated April 2, 2009, WSH said that Mosteller's competency was restored and he was competent to stand trial. Supp. CP 102-112. Mosteller was returned to the Lewis County jail to await trial. While waiting in the jail, Mosteller stopped taking his medications, necessitating another trip back to WSH for competency restoration. The parties entered a

second agreed order to restore competency, with the same provision to medicate Mosteller without his consent, if necessary. CP 37-39. There is no evidence in the record of any objection to any part of the second order.

In a report dated September 24, 2009, the evaluator noted that Mosteller "said he stopped taking medications when in the jail and stated that he adamantly did not want to take any antipsychotic medication." Supp. CP 95. Within a day of arriving at WSH, Mosteller had to be placed in seclusion for being verbally abusive to staff. Supp. CP 95. Mosteller was prescribed Risperdal, but it is not clear from the report whether the drug had to be administered without Mosteller's consent. Supp. CP 90-101 (September 2009 report). Competency was restored, and Mosteller waived jury, was tried in a bench trial. Mosteller retained an expert to present testimony on his theory of "diminished capacity." The trial court found Mosteller guilty as charged. RP 1-186. In finding Mosteller guilty, the trial court orally ruled as follows:

COURT: . . . I find the defendant guilty on both counts. It gives me no pleasure to do it, but I think my analysis of the evidence that I have in front of me compels that decision.

I'll deal with the assault first. It's clear that, as Mr. Underwood [defense counsel] stated, that there was an assault, it did happen, that there was a

striking of the officer. It happened on November 24, 2008. It happened in the State of Washington. Officer Reynolds was on duty, performing his official duties as a police officer for the City of Centralia.

The question here is whether Mr. Mosteller was able to form the requisite intent or whether he had diminished capacity such that he was unable to form that intent. The same type of analysis applies to the criminal trespass in the first degree for entering or remaining unlawfully in the building of Starbuck's.

The testimony of the experts, while there are some different conclusions reached as to the ultimate question--that is, the experts' opinions varied, their opinions varied, as to whether he had diminished capacity, they did agree on a lot of underlying facts. They both agreed that someone who has a mental disorder such as Mr. Mosteller [RP 182] could still form the intent to commit an assault.

Dr. Trowbridge's testimony was that he felt that Mr. Mosteller's ability to form intent to commit the assault was diminished but he was not saying that Mr. Mosteller couldn't form the intent. Dr. Trowbridge properly deferred to the court to make that decision.

And what I look at here is the things that went on that day. I agree with [defense counsel] that the exchange at Denny's does not mean that Mr. Mosteller was angry and, therefore, because of the contact with Officer Reynolds earlier that day he carried that anger over to the Starbuck's and that's why he lashed out at Officer Reynolds. I don't find that the evidence shows that. But the earlier contact is important because, as Dr. Kramer stated, there's a lack of data that day indicating that he was delusional, that he was having problems that day.

Officer Reynolds indicated that he was able to converse with Mr. Mosteller about the incident at

Denny's, they were able to have conversations, he arrested him without incident, cited him, released him, and there was no problem. As [the State] argued, there was no--the issue--or the defense that his parents own the store was not raised that day, the nonsensical delusional things were not raised that day.

We get back to the Starbuck's. There is some testimony from the officer that when he had contact with Mr. Mosteller out on the patio that there was some--a couple of responses that didn't make sense when the officer was telling him that he had to leave. I believe that is where on cross-examination one or two responses were characterized as gibberish.

But what happened next is important and that is when the officer told him that he'd been trespassed, that he was not going into the store and that he had to leave and Mr. Mosteller responded with quote, "I'll leave as soon as I get my refill." That indicates to me that he knew exactly what he was doing, he knew that he was not supposed to go in, he was understanding the directions that were given to him by the officer, and he chose to ignore them.

When he went back in the store at that point, that shows--it was at that point that he committed the trespass in the first degree. He kept walking away from the officer, then turned, put his cup down, and then came at the officer, who the witnesses indicated put his hands up in a defensive gesture and Mr. Mosteller reached back, made a fist, and punched the officer in the jaw. The actions that were taken then established for me that there was intent, that he had the ability to form that intent.

The basis for Dr. Trowbridge's conclusion that Mr. Mosteller had diminished capacity to form intent was based on the many delusional statements that were made to Dr. Trowbridge by Mr. Mosteller when he evaluated him in June of 2008, seven months after

the incident, and it occurred during a time when Mr. Mosteller was acutely psychotic. So his reporting of events at that point I don't put much weight in.

And I think Dr. Trowbridge indicated he had no other information indicating these delusional statements were being made. That's consistent with what Dr. Kramer said, that there was no data from that day indicating that there were other delusional statements being made, again, talking about his parents owning the stores, nothing like that happened at the time. There's no information from any witnesses that supports that.

So, for those reasons, I find that diminished capacity has not been established, that there was intent to commit the crime of assault in the third degree and the crime of criminal trespass in the first degree.

RP 182-185. No written findings were entered. Mosteller was sentenced to 33 months in prison plus 27 months of community custody. CP 11-19; 10/30/09 RP 6. Mosteller filed a timely appeal, and the State submits this brief in response to his opening brief on appeal.

ARGUMENT

A. THE ISSUE OF ORDERING "FORCED MEDICATION" WITHOUT A SELL HEARING IS MOOT, BUT EVEN IF THE ISSUE IS CONSIDERED, IT IS WITHOUT MERIT BECAUSE BOTH ORDERS WERE "AGREED" WITHOUT OBJECTION, AND FURTHERMORE, ANY ERROR IS HARMLESS BEYOND A REASONABLE DOUBT.

Mosteller claims that the trial court erred when it entered the orders to restore his competency to stand trial because the

provision in those orders allowing Western State Hospital to administer psychotropic medications without Mosteller's consent "if necessary" were entered without a prior hearing and findings pursuant to Sell v. U.S., 539 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). For the reasons discussed below, the State disagrees with these contentions.

As Mosteller points out, a defendant has a significant, constitutionally protected, liberty interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution in avoiding the unwanted administration of antipsychotic drugs. Washington v. Harper, 494 U.S. 210, 221, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990). However, that liberty interest can be overcome by an overriding state interest. Harper, 494 U.S. at 225-227; Riggins v. Nevada, 504 U.S. 127, 134-135, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992). That said, it also seems that, "[t]he circumstances under which a court may constitutionally authorize involuntary medication for the sole purpose of restoring a criminal defendant's competency to stand trial have become quite complex as a result of the Supreme Court decision in Sell v. U.S." Michael J. Finkle, *Washington's Criminal Competency Laws*:

Getting from Where We Are to Where we Should Be, 5 Seattle J. for Soc. Just. 2001 (2006), citing Sell v. U.S., 539 U.S. 166 (2003).

Thus, the State is constitutionally permitted to involuntarily administer antipsychotic drugs to a mentally ill defendant to render that defendant competent to stand trial if the State meets its burden of proof in showing that: (1) important governmental interests are at stake; (2) involuntary medication will significantly further those interests in that the administration of the drugs is substantially likely to render the defendant competent to stand trial and it is substantially unlikely that the drugs will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense; (3) involuntary medication is necessary to further those State interests; and (4) the administration of the drugs will be medically appropriate. Sell, 539 U.S. at 179-181.; RCW 71.05.217. However, the Sell opinion also contains somewhat of a *caveat* when it notes that a trial court does not have to go through the tests set out in Sell if the medication is warranted for a purpose other than competency-rendering treatment. The Sell Court cited Washington v. Harper as an example. In Harper, the Court upheld procedures for involuntarily medicating prison inmates on the basis

of potential dangerousness--not solely for the purpose of rendering a defendant competent to stand trial. Harper, supra.

The State bears the burden of proving each element of the involuntary medication inquiry by clear, cogent and convincing evidence. RCW 71.05.370(7)(allowing antipsychotic drugs to be administered without an individual's consent only by court order after a judicial hearing); In re Schuoler, 106 Wn.2d 500, 510, 723 P. 723 P.2d 1103 (1986). So, the case law tells us that a hearing is necessary under Sell before medication is ordered to be administered involuntarily. These cases do not, however, answer the questions of whether a defendant may waive the right to a Sell hearing, or whether a defendant must object to entry of the order to medicate without consent at the time it is entered. Nor do these cases expressly state whether a Sell hearing must be held where there has been no objection, and where it is not clear whether drugs actually were given without consent, or whether the defendant actually refused to take the medication. (As in this case). And what about a case where the Sell issue is technically moot? (As in this case).

In Mosteller's case, the State's position is that the Sell hearing issue is now moot, and that Mosteller's failure to object to

the order to medicate without his consent "if necessary" has not preserved this issue for review. Nor it is clear that WSH actually has to administer the psychotropic medication to Mosteller "involuntarily." Finally, should this Court decide this issue can be raised for the first time on appeal, it should also find that error, if any, was harmless beyond a reasonable doubt under the facts presented here.

1. The "Failure to Hold a Sell Hearing" Issue is Moot In This Case At This Juncture.

Mosteller raises the issue of failure to hold a Sell hearing for the first time on appeal. However, there is no longer an issue about holding a Sell hearing because no one is currently asking to involuntarily medicate Mr. Mosteller--his case is over. Because there is no longer a pending order to administer medication without Mosteller's consent, the issue of holding a Sell hearing before entering such an order is now moot.

"An issue is moot when a court can no longer provide meaningful relief." In re Detention of J.S., 138 Wn.App. 882, 889-890, 159 P.3d 435 (2007). In the present case, the trial court ordered Mosteller back to WSH for restoration of competency, including a directive to administer medication without Mosteller's consent "if necessary" to achieve the goal of competency. CP 43-45. There was no objection to this order, so there was no Sell hearing, and Mosteller was sent to WSH for restoration of

competency, which was accomplished via that first order. 2/12/09 RP 3,4. Mosteller's competency was ultimately restored, and he got his fair trial, was found guilty, and was sentenced. CP 11-19. Thus, there is no longer an existing order to administer "forced" medication to Mosteller, nor is there any pending request to do so. Accordingly, the issue is now moot, and this Court need not consider it..

2. Mosteller did Not Object to Entry of Either Order to Medicate Him Without His Consent, Nor is It Clear That any Medication was Actually Administered Without His Consent, And His Failure to Object Has Not Preserved the Issue For Review, Nor is the Alleged Error "Manifest."

Mosteller argues that the failure to hold a hearing prior to entering the order containing the provision that WSH could medicate Mosteller without his consent "if necessary" violated his constitutional rights under Sell. The State disagrees.

First of all, despite the existence of the Sell case, it is difficult to see how the trial court, or any of the parties below, were required to hold a Sell hearing when Mosteller did not voice any objection whatsoever to entry of the order to medicate him without his consent ("if necessary") to restore his competency. 2/12/09 RP 3,4. Indeed, both such orders entered in this case are signed by Mosteller's counsel as "approved for entry" orders, and there is no record of Mosteller objecting to any part of either of these

orders. CP 43-45; CP 37-39; 2/12/09 RP 3,4. This Court should accordingly find that Mosteller has not preserved this issue for review.

A party may not raise a claim of error on appeal that was not raised in the trial court unless it involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a). This rule reflects, "a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule is also supported by considerations of fairness to the opposing party:

"the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal." . . . Lewis H. Orland & Karl B. Tegland, 2 Wash. Prac. 483 (4th ed. 1991)).

State v. Avendano-Lopez, 79 Wn.App. 706, 710, 904 P.2d 324 (1995).

No "Manifest" Error

RAP 2.5(a)(3) allows an issue to be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." Such errors "are treated specially because they often result in serious injustice to the accused." Scott, 110 Wn.2d at 686. Still, an alleged error is only "manifest" if the defendant can show it had practical and identifiable consequences in the trial of the case. State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

Mosteller cannot make such a showing here. In the present case, the discussion of the medication issue in the oral record is as follows:

PROSECUTOR: Western State did send back a report dated February 9, 2009 in which it was the opinion of the doctor that did the review that Mr. Mosteller is not competent to stand trial. I've discussed this with counsel. I prepared an order of commitment to Western State for 90 days to restore competency. Included in there is a provision as suggested by the report that any medications be administered without consent if necessary.

DEFENSE: . . . I have got the report from Western State Hospital and have reviewed it. I understand that under the statute the prosecutor has the right to request he be sent back up there. For the record, Mr. Mosteller has been up there numerous times, has not worked that well in the past, but I think the court has enough discretion to go ahead and recommit [sic].

PROSECUTOR: Review date?

COURT: Well, it is a 90-day commitment, so May 7. I signed the order. Strike the trial date for next week.

2/12/09 RP 3,4 (emphasis added).

As can be seen from this exchange between the parties and the trial court, there was no objection to any part of the order by anyone, including Mosteller himself. Id. And, Mosteller's clinical history as documented by WSH, most certainly indicates that Mosteller is *fully capable of vigorously objecting* to taking psychotropic medication--even when he is in a psychotic state upon first being admitted to WSH. See, e.g., September 24, 2009, WSH evaluation, discussing Mosteller's state of mind after the second restoration order that was entered because Mosteller stopped taking his medications in jail. At that point--as he was when first sent back to court after WSH found him incompetent the first time--Mosteller was technically incompetent. However, even in that state of mind, Mosteller stated his objections to being on medication. Supp. CP 95.

And, Mosteller's experience and knowledge about such medication was evidenced when, after he had been taking the medication again during the second restoration period, Mosteller's "insight into the need for medication was improved in that he

acknowledged that medication reduces his stress and anger and makes him sleep better. He said that he was planning to take medication in jail and in the community because he did not want to end up at Western State Hospital again." Supp. CP 96.

All of this shows that, even in an incompetent state, Mosteller is plenty able to object to being involuntarily medicated if he doesn't want to take his medication. But Mosteller did not object to either order which contained the provision that he should be medicated without his consent. 2/12/09 RP 3,4; CP 37-39; CP 43-45. Furthermore, as to Mosteller's agreeing to the first restoration order (before he returned for restoration of competency), he does not cite any authority for the proposition that any administration of medication to a mentally ill defendant who has been found incompetent to stand trial constitutes the "involuntary" administration of medication as a matter of law.

Indeed, under this reasoning, after having been found incompetent to stand trial, no defendant would *ever* be able to consent to medication--or to request desired medication--prior to a full judicial inquiry under Sell. Not to mention the fact that such a position would seem to make it illegal for any doctor to administer

medication to any patient with a mental illness who seeks such medication.

Imposing such a duty to hold a full evidentiary hearing under Sell for every mentally ill defendant when that defendant does not object to the possibility that medication can be administered without his consent is illogical, unsupported by authority, and would grind our system to a halt.

Let it be said that the State's position on this issue is not to minimize the gravity of administering psychotropic medications against a person's wishes. But the record in this case does not support a conclusion that Mosteller objected to the provision to medicate without his consent, nor does the record clearly show that any medication was actually administered to him without his consent.. Nor does this record support a claim of "manifest constitutional error."

Mosteller cannot show "manifest error" because *even if* it was error to fail to hold a Sell hearing before entering the orders allowing "forced" medication ("if necessary"), Mosteller has not shown that this affected the outcome of his case. One reason he cannot make this showing is because the reports from WSH-- completed by doctors that the State would have subpoenaed for

any Sell hearing--contain overwhelming evidence to allow the Court to order that Mosteller be involuntarily medicated, if necessary. Supp. CP 90-139. These thorough psychiatric reports dating from 2005-2009, document Mosteller's many prior admissions to WSH, the consistent diagnoses of his mental illness, his well-known habit of refusing or stopping his medication and decompensating into criminal and assaultive behavior, and how quickly his demeanor changed, once back on the medication, and his lengthy criminal history dating back to the 1970's. Id.

So, *even if* there *had* been a Sell hearing, the State would have brought in the doctors who wrote these reports to testify about the need to medicate Mosteller against his will, if necessary, in order to restore his competency. Furthermore, Mr. Mosteller is well known to Lewis County Courts, as the WSH evaluations dated July and November 2005 show (Mosteller was sent to WSH for evaluations by Lewis County Superior Court at that time as well). Supp. CP 123-139. In sum, there is no doubt that, had a Sell hearing been required, and/or occurred, the State would have met its burden under Sell to support an order to medicate Mosteller without his consent.

Thus, Mosteller cannot show that the outcome of this case would have been different, had a Sell hearing occurred. Absent this showing of prejudice, there was no "manifest error" and Mosteller cannot raise this issue for the first time on appeal.

3. *Even If it Was Error to Fail to Hold a Sell Hearing, any Error Is Harmless Beyond a Reasonable Doubt.*

If this Court finds it was error to not hold a Sell hearing before entering the orders to medicate without consent, "if necessary," and that Mosteller can raise this issue for the first time on appeal, this Court should find any error harmless beyond a reasonable doubt.

If a claim is of constitutional magnitude, the reviewing court "should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R. 3d 1065 (1967)(holding that before error can be held harmless, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction)." State v. King, 167 Wn.2d 324, 333, 219 P.3d 642 (2009).

In the present case, the alleged error in ordering that WSH could medicate Mosteller without his consent (if necessary) to

restore competency, without a prior Sell hearing did not contribute to Mosteller's conviction for all of the same reasons stated in the preceding discussion regarding "manifest error." In sum, because it is clear from all of the reports included in WSH's "packet" that, had a Sell hearing occurred, the trial court would have made the same decision to allow "forced" medication--so this alleged error did not affect the outcome of this case. In other words, any error is harmless beyond a reasonable doubt because had the trial court conducted a Sell hearing, overwhelming evidence (as stated in the evaluations--which would have been presented via live testimony from the authors of those reports at any Sell hearing) shows that the trial court would have come to the same conclusion and entered the same order to allow Mosteller to be medicated without his consent.

Therefore, the outcome of Mosteller's trial was not affected. State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985)(for errors of constitutional magnitude, the court asks whether any reasonable fact finder would have reached the same result without the alleged error). This Court should agree, and find that error, if any, was harmless.

B. THE STATE CONCEDES THE LENGTH OF THE COMMUNITY CUSTODY PERIOD IS INCORRECT, BUT THE COMMUNITY CUSTODY PROVISION THAT MOSTELLER CONTINUE TAKING HIS PSYCHOTROPIC MEDICATION WAS PROPERLY IMPOSED AND SHOULD BE UPHELD.

Mosteller claims that the 27 month period of community custody imposed on the assault 3rd conviction was improper. Mosteller is correct as to this assertion. The correct community custody period for this offense is 9 to 18 months--so long as the total period of confinement and community custody does not exceed the statutory maximum for the crime. RCW 9.94A.715; In re PRP of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). Accordingly, as to this error, this case should be remanded to amend the judgment and sentence to correct the error in the community custody period on the felony conviction.

1. The Condition of Community Custody that Mosteller Must Continue Taking his Prescribed Medication Should be Upheld.

Mosteller further claims that the condition of community custody requiring him to continue taking his antipsychotic medication "must comport with the limitations on forcible administration of drugs applied in other contexts." Mosteller cites a 2004 9th Circuit Court of Appeals opinion for this proposition. Although Washington appellate courts give consideration to Ninth

Circuit decisions, they are not obligated to follow them. See, e.g., In the Matter of Grisby, 121 Wash.2d 419, 430, 853 P.2d 901(1993). The State disagrees with Mosteller's argument on this issue, and this Court should uphold the provision of community custody directing Mosteller to continue taking his prescribed antipsychotic medication as part of his sentence.

A crime-related community custody condition is reviewed for an abuse of discretion. State v. Autrey, 136 Wn.App. 460, 466-67, 150 P.3d 580 (2006). A trial court abuses its discretion when its decision is based on untenable grounds, including those that are contrary to law. State v. Brooks 142 Wash.App. 842, 850-852, 176 P.3d 549 (2008). A trial court may generally impose crime-related prohibitions or affirmative conditions as part of community custody. RCW 9.94A.505(8); Autrey, 136 Wash.App. at 466, 150 P.3d 580.

Additionally, a trial court may order an offender to “ ‘participate in crime-related treatment or counseling services’ ” when imposing community custody. Brooks, supra., quoting State v. Jones, 118 Wash.App. at 208-09, 76 P.3d 258 (quoting LAWS OF 1988, ch. 153, § 2); RCW 9.94A.700(5)(c). And, a trial court may order an offender to undergo mental health evaluation and treatment as a condition of community custody if it complies with

certain procedures. RCW 9.94A.700(5)(c); RCW 9.94A.505(9); *Jones*, 118 Wash.App. at 208-09. First, the court must find "that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025." RCW 9.94A.505(9); *Jones*, 118 Wash.App. at 208-11. Second, that this mental health condition was "likely to have influenced the offense." RCW 9.94A.505(9); *Jones*, 118 Wash.App. at 208-11, 76 P.3d 258. An "order requiring mental status evaluation or treatment must be based on a presentence report" or "mental status evaluation and the court must find that the offender was a mentally ill person whose condition influenced the offense." *Jones*, 118 Wn.App. at 210.

The record in the present case supports all of these "elements" for imposing the condition that Mosteller continue taking his prescribed medication while on community custody. In the first place, just as Mosteller did not object to the provision in the restoration order that he be medicated without his consent, if necessary, Mosteller did not object to any of the conditions of community custody imposed by the trial court. In fact, Mosteller requested mental health treatment at sentencing. 10/30/09 RP 4. When the State said at sentencing, "the State would request that

Mr. Mosteller undergo a mental health evaluation and treatment during that DOC time." 10/30/09 RP 4. Mosteller's defense counsel responded:

With regard to the mental health treatment, your Honor, we'd ask that it not only . . . it's going to be required certainly when he's on community custody, but we would ask it be put in his J&S so that he can get treatment in jail or in prison. There's no guarantee if it's not in there that he will. And I don't think there's any doubt in this case, Your Honor, that my client has ongoing significant mental health issues and that his treatment needs to be ongoing.

10/30/09 RP 4,5 (emphasis added). So, Mosteller requested that mental health treatment be part of his sentence. And, as all of the reports from WSH regarding Mr. Mosteller show, psychotropic medications appear to be Mr. Mosteller's best hope to keep him from falling back into the tragic cycle of psychosis and imprisonment. Supp. CP (packet of evaluations from WSH).

Secondly, as previously noted, a sentencing court may properly order an offender whose sentence includes community custody to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. Furthermore, our courts have

upheld orders requiring defendants to participate in treatment programs as a condition of their sentences. See e.g., State v. Eaton, 82 Wn.App. 723, 919 P.2d 116 (1996). There, the court held that the trial court could require cooperation in a treatment program, otherwise there would be no point in ordering a defendant into treatment at all. Id., 82 Wn.App. at 734.

That point is well-taken in the present case. If Mosteller's mental health treatment requires medication (which it obviously will), but the trial court is without authority to order him to take such medications, then ordering mental health treatment would be pointless, as pointed out in Eaton, supra. Furthermore, without question, Mosteller's mental illness "influenced" the offenses in this case. This is evidenced by all of the WSH evaluations which document that when Mosteller is off his medication, he quickly decompensates into an agitated, assaultive, and confrontational person. Supp CP 90-139.

And, that is exactly what occurred in this case. Mosteller went into the Starbucks and started harassing patrons, saying inappropriate things to them and touching their belongings to the point that he was asked to leave. RP 71,72. Then, when police arrived, Mosteller, without provocation, became agitated and

slugged a police officer and engaged in a wrestling match with the office that knocked over furniture in the store. RP 77-95. Indeed, Mosteller's behavior that resulted in charges of assault third degree and criminal trespass in this case, appears to be common for Mosteller when he is not taking his medication--and his criminal and psychiatric history bears this out. Supp. CP 90-139. Thus, it is patently apparent that Mosteller's mental illness "influenced his crimes." Jones, supra.

Accordingly, the condition to continue taking prescribed medications as a condition of Mosteller's community custody sentence was properly imposed, and is supported by the evidence, the law, and by the court's oral ruling.,

Furthermore, contrary to Mosteller's interpretation of the law, the constitutional concerns of Sell are not triggered in the first place unless the medication is administered "involuntarily" and for the sole purpose of restoring competency for trial. Sell, 539 U.S. at 181-182 (citing Harper, 494 U.S. at 225-226). In fact, the considerations in Sell are not relevant if the medication is ordered for a different purpose--such as the defendant's own request for mental health treatment tailored to the defendant's psychiatric history. Id. Indeed, why would a sentencing court be required to

engage in a futile Sell analysis, where the mental health treatment is not only not objected to, but is implicit in the defendant's own request for the treatment--like occurred here?

To be sure, as Mosteller's counsel said at sentencing, "I don't think anybody who was involved in this trial can say with a straight face that my client does not have significant mental health issues. . . ." 10/30/09 RP 5. Mosteller himself said the same--in his own sad, bewildered way, that only one dealing with the roller-coaster-like demons of mental illness can express. Id. at 6. Similarly, when imposing the sentence in this case, the trial court said, "[t]his is a situation, Mr. Mosteller, where I agree with your attorney, there's no doubt in my mind that you have some serious mental health issues." Mosteller replied, "[y]es sir." The court said, "[t]hat's apparent when you look at your criminal history." Mosteller said, "yeah." 10/30/09 RP 7.

Indeed, like many of us involved in the criminal justice system , who see far too many defendants like Mr. Mosteller, the trial court's compassion at sentencing for Mosteller's situation is palpable--even when one is simply *reading* the sentencing transcript. For instance, while struggling to fashion a fair sentence to include mental health treatment, the trial court told Mosteller that

staying on his medication was critical, and that, "I want you to take your medication because you're doing so much better now than you were--[than the] times I've seen you before. . . ." Mosteller said, "yeah." The court continued--"you know. And I think you probably feel better. . . and I think your life's going to go better as long as you. . . but you have to make that commitment to stay up with your treatment, stay up with your medication." Mosteller said, "yes, sir."

10/30/09 RP 9.

To sum up, the condition of community custody that Mosteller continue taking his prescribed mental health medication was properly imposed as part of the mental health treatment that Mosteller himself requested. As such, the requirements of Sell or Harper are not triggered. Furthermore, and obviously, mental illness was inextricably tied up in the tangle of Mosteller's assault on the officer and the trespass crime. As such, it is readily apparent that "mental illness influenced the crime." Brief of Appellant 19, citing State v. Jones, 118 Wn.App. 199, 76 P.3d 258 (2008). Accordingly, the condition of community custody that Mosteller continue taking his psychotropic medication as part of his continuing mental health treatment was properly imposed. This Court should uphold that condition.

C. MOSTELLER'S OFFENDER SCORE WAS PROPERLY COMPUTED AT "7" BECAUSE HE WAS ON COMMUNITY CUSTODY AT THE TIME HE COMMITTED THIS OFFENSE, WHICH ADDS AN ADDITIONAL POINT BY STATUTE, AND BECAUSE HE STIPULATED TO HIS CRIMINAL HISTORY AND OFFENDER SCORE.

Mosteller claims that his offender score is incorrect, and that the stipulation on criminal history that he signed "carries no legal authority." This is not correct.

A challenge to an offender score is a sentencing error that a defendant may raise for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). The trial court's calculation of an offender score is reviewed *de novo*. State v. Watkins, 86 Wn.App. 852, 854, 939 P.2d 1243 (1997).

Furthermore, a sentencing court may rely on a stipulation of prior convictions without further proof. See RCW 9.94A.530(2). In re Cadwallader, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). However, where the alleged error involves a stipulation to incorrect facts or where the offender score calculation involves a matter of trial court discretion, such offender score is *not* subject to appeal. In re PRP of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Thus, "waiver may be found where a defendant stipulates to incorrect facts." Id. A sentencing court may add one point to an offender score if it finds by a preponderance of evidence that the defendant

was under community custody when he committed the current offense. State v. Jackson 150 Wash.App. 877, 891-892, 209 P.3d 553(2009), *citing* former RCW 9.94A.525(19) (2007); State v. Jones, 159 Wash.2d 231, 239 n. 7, 241, 149 P.3d 636 (2006), *cert. denied*, 549 U.S. 1354, 127 S.Ct. 2066, 167 L.Ed.2d 790 (2007).

At sentencing in the present case, the prosecutor explained that Mosteller's offender score was "7" due to "six prior felonies, and then the defendant was on community custody." 10/30/09 RP 2 (emphasis added). Furthermore, Mosteller signed a "stipulation on offender score,"-- a document which contained the express provision that Mosteller *agreed* that none of his prior listed felony convictions "washed" due to some 45 misdemeanor convictions. CP 20-21. This stipulation also included the statement that Mosteller gained an additional point for being on community custody at the time the current offense was committed. CP 20. Given this stipulation to the extra point for being on community custody, Respondent doubts that the State had the additional burden to prove by a preponderance what Mosteller expressly agreed to. Indeed, there was no objection whatsoever to the offender score or criminal history at sentencing. 10/30/09RP 2-10. And, contrary to Mosteller's claim for the first time on appeal, this

stipulation is valid and enforceable. State v. Huff, 119 Wash.App. 367, 371, 80 P.3d 633 (2003). Accordingly, Mosteller's stipulation supplied the necessary "facts in the record" to support the trial court's offender score calculation and sentencing. Huff, 119 Wash.App. at 371-72; see also State v. Foster, 140 Wash.App. 266, 276, 166 P.3d 726 ("Foster's stipulation to the comparability of [his out-of-state] conviction to a Washington class B felony and to the fact that it had not washed out is an admission of its existence ..., its comparability, and its continuing viability for inclusion in his offender score."), *review denied*, 162 Wash.2d 1007, 175 P.3d 1094 (2007).

Furthermore, there is no evidence in the record showing exactly when Mosteller was released from confinement for the 1988 conviction, nor is there evidence showing whether Mosteller may have committed supervision violations for the 1988 offense after his release for that offense. Confinement for such violations is confinement for a felony conviction that interrupts the wash-out period in former RCW 9.94A.360(2); See State v. Blair, 57 Wn.App. 512, 515-16, 789 P.2d 104 (1990). Thus, there is insufficient evidence in the record to find that a calculation error actually occurred as to the wash-out period. Because Mosteller,

represented by counsel, stipulated that his offender score was "7" and stipulated to the facts the trial court used to calculate his offender score, and there is no indication that the trial court acted outside its statutory authority in imposing Mosteller's sentence, Mosteller has waived any challenge to his offender score calculation. The stipulation on criminal history is binding, and should be upheld on appeal.

On the other hand, if this Court finds that the stipulation on criminal history is simply unenforceable, the State can address this issue when this case is remanded to correct the length of the community custody portion of the sentence. The same is true for the various typographical errors in the stipulation (they appear to be an unfortunate hazard of the computer age and the re-use of stored forms). The State does not concede that those typographical errors nullify the stipulation, but the State can certainly correct those errors when the case is remanded as well--if this Court so orders.

D. MOSTELLER'S TRIAL COUNSEL WAS NOT INEFFECTIVE AT SENTENCING.

Mosteller claims his trial counsel was ineffective for agreeing to the terms of the stipulation on criminal history and offender score, including the provision that Mosteller agreed that none of his

crimes "washed" due to 40-plus intervening misdemeanor convictions. This argument is not persuasive.

The standard for proving ineffective assistance of counsel is an extremely difficult one to meet. A defendant demonstrates ineffective assistance of counsel by proving (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986). An ineffective assistance claim *fails* if *either prong* of the Strickland test is not met. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Put differently, to prove ineffective assistance, a defendant must show that counsel's performance was deficient *and* that the deficiency was prejudicial. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A defendant's counsel is ineffective if there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. Strickland, 466 U.S. at 687-88. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Cienfuegos, 144 Wn.2d 222,

229, 25 P.3d 1011 (2001) (citing Strickland, 446 U.S. at 694).

Reviewing Courts strongly presume that the appellant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). The reviewing Court will be "highly deferential" in evaluating a challenged attorney's performance. Strickland, 466 U.S. at 689. Furthermore, an appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn.App. 680, 684-685, 763 P.2d 455 (1988).

Here, Mosteller alleges that his counsel made "one mistake." According to Mosteller, his counsel allegedly failed to "investigate" whether Mosteller's 1988 conviction "washed" for purposes of his offender score. This does not reach the level of ineffective assistance of counsel because it cannot be presumed that the offender score was wrong--so Mosteller cannot meet the prejudice prong of Strickland.

Because we cannot determine whether Mosteller's offender score was incorrectly calculated, we cannot conclude that Mosteller's counsel was deficient in agreeing to the stipulated offender score. In other words, Mosteller cannot show that he was prejudiced by his counsel's agreement to the offender score,

because there is nothing in the record to show the offender score is incorrect, and there is nothing in the record to show that trial counsel should have known it was wrong. But Mosteller's argument *presumes* that the stipulation on offender score is wrong, and that counsel should have known it was wrong. These presumptions are not supported by the record or the law.

The fact of the matter is that, given all that the parties knew about Mr. Mosteller's extensive psychiatric and criminal history at sentencing, it is not surprising that defense counsel would not "bat an eye" at the recitation of Mosteller's criminal history in the stipulation--or to the conclusion that none of Mosteller's priors washed due to "45" misdemeanors. CP 20-21. Frankly, just as Mosteller's appeal counsel is apparently astonished at trial counsel's agreement that none of Mosteller's convictions washed, Respondent is equally incredulous that anyone would presume that Mr. Mosteller would have suddenly "fell off the community radar" so to speak, between the years of 1988 and 1997: that he stopped committing misdemeanor crimes altogether and had no probation violations--while at the same time managing to stay out of a mental hospital during all that time. In sum, it seems extremely unlikely that Mr. Mosteller could go a full five years without any interrupting

events occurring, although stranger things have certainly happened. That said, Respondent is very aware that this is not the relevant test.

The point is, Mosteller has not met the very high bar for proving ineffective assistance of counsel under Strickland, supra. And the State is not aware of any case that stands for the proposition that trial counsel's failure to independently investigate the accuracy of an offender score is ineffective assistance of counsel *per se*. And Mosteller cites none. His ineffective assistance claim fails.

E. THE STATE CONCEDES THAT WRITTEN FINDINGS WERE NOT ENTERED AFTER THE GUILTY FINDING IN THE BENCH TRIAL BUT THERE IS NO PREJUDICE AND THE REMEDY IS TO REMAND FOR ENTRY OF SAID FINDINGS.

Mosteller also claims that the trial court's failure to enter written findings following the bench trial "precludes meaningful appellate review." The State concedes no written findings were entered, but disagrees as to the remedy, and disagrees with the exaggerated claim that this precludes meaningful review.

Unquestionably, CrR 6.1(d) requires the trial court to enter findings of fact and conclusions of law following a bench trial. The purpose of this requirement is to enable review of the questions

raised on appeal. State v. Head, 136 Wash.2d 619, 621-22, 964 P.2d 1187 (1998). When the trial court completely fails to enter findings and conclusions after a bench trial, the only remedy is *remand for entry of the same*. Head, 136 Wash.2d at 624. It is well settled that the trial court has the authority to enter the written findings of fact and conclusions of law subject to the constraints of RAP 7.2(e). But reversal is appropriate only where a defendant can show prejudice resulting from the *absence of* findings and conclusions, or following remand. Head, 136 Wn.2d at 625; State v. Pruitt, 145 Wn.App. 784, 794, 1887 P.3d 326 (2008). Courts will not infer prejudice; a defendant must show actual prejudice due to tailoring of the findings and conclusions after remand. Id. The burden of proving prejudice resulting from late entry of written findings and conclusions is on the defendant. State v. Royal, 122 Wn.2d 413, 423, 858 P.2d 259 (1993). Thus, even where findings were not entered at all after a bench trial, as here, the defendant still must show he was prejudiced by the absence of written findings. Pruitt, supra; Head, supra.

In the present case, it is undisputed that written findings were never entered. However, the correct remedy for failure to enter findings following the bench trial is remand for entry of the

findings. Head, supra. Additionally, the State questions whether Mosteller has shown that he has been prejudiced by the lack of findings. As one court has put it, "It is impossible for . . . [the defendant] to show that he was prejudiced in this case, because he does not challenge any aspect of the court's decision. The findings could not possibly . . . [be] tailored to the issues presented on appeal, because no factual challenges were argued in the opening brief." State v. Vailencour, 81 Wash.App. 372, 378, 914 P.2d 767, 770 (1996). In other words, Mosteller does not argue that the lack of findings makes it impossible to argue sufficiency of the evidence, or whether the findings might support his diminished capacity claim at trial. And, given the obvious overwhelming evidence presented at trial to support the convictions for assault in the third degree and criminal trespass--as thoroughly documented in the trial court's *oral findings* below (RP 182-186) -- a sufficiency challenge is not likely to succeed in any event.

Furthermore, it seems acutely unfair that a defendant can simply sit back in the "weeds" and remain silent on the issue, in the hope that the State will forget to present findings--and then benefit from his silence on appeal. Unfortunately, general grouching about "unfairness" doesn't fly when the party doing the grouching is the

State. So, the failure to enter written findings requires remand for entry of findings--not reversal. Head, supra.

In anticipation of a claim that remand for entry of findings is unfair because the findings can be tailored to the issues in Mosteller's brief, the trial court's detailed oral findings will make entry of late findings much easier, and will also help greatly to avoid an allegation that the findings are "tailored." Furthermore, it would be unethical for a prosecutor to tailor late findings to the issues raised in an appellant's opening brief (at least that is the opinion of this Respondent).

In sum, because Mosteller has not shown how he would be prejudiced by the entry of late findings (nor has he shown prejudice due to failing to enter findings at all), the remedy is to remand for entry of said findings-- if this Court agrees that must be done here. Head, supra.

CONCLUSION

The failure to hold a Sell hearing before ordering that medication be administered without Mosteller's consent was not error because there was no objection to the order, and the order was agreed to by the parties. Therefore, Mosteller has not preserved this issue for review. Furthermore, Mosteller cannot

raise this issue for the first time on appeal because he cannot show "manifest error affecting a constitutional right." Additionally, the many evaluations from WSH show that had a Sell hearing occurred, the trial court would have granted the request to administer the medications involuntarily, so any error should be found harmless.

Mosteller's offender score was correctly calculated and was based on a valid, binding stipulation on criminal history. Because the record does not show that the offender score is wrong, Mosteller's counsel was not ineffective for failing to challenge the computation of the score, because Mosteller cannot show that he was prejudiced by the alleged deficiency of his counsel. The condition of community custody that Mosteller remain on his prescribed medication is properly imposed, and did not require a prior Sell-type analysis because Mosteller requested mental health treatment, and because his mental illness influenced the crimes. Accordingly, as to all of these issues, Mosteller's claims are without merit, and his conviction and sentence should be affirmed.

However, the State concedes that it was error to fail to enter written findings following the bench trial, and further concedes that the length of the community custody period in the judgment and

sentence is incorrect. The correct remedy for these two concessions of error is remand for entry of late findings (if this Court finds that Mosteller was prejudiced by this error) and remand to correct the length of the community custody portion of Mosteller's sentence.

RESPECTFULLY SUBMITTED THIS 16th day of June, 2010.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

BY:

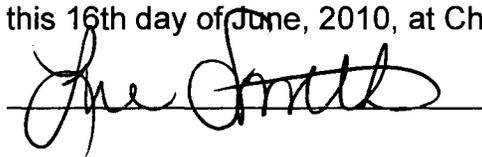

LORI ELLEN SMITH, WSBA 27961
Deputy Prosecuting Attorney

Declaration of Service

The undersigned certifies a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, postage prepaid, addressed to Appellant's Attorney as follows:

Washington Appellate Project
1511 Third Ave. Suite 701
Seattle, WA 98101

Dated this 16th day of June, 2010, at Chehalis, Washington.



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