

No. 42423-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN D. TAUSCHER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Did the trial court err in refusing to appoint new counsel to Tauscher when he filed a motion to withdraw his guilty plea?
- B. Was Tauscher's guilty plea knowing and voluntary?
- C. Did the trial court err by including Tauscher's California conviction for Grand Theft in the calculation of Tauscher's offender score?
- D. Did the trial court err when it found in the judgment and sentence that Tauscher had the present or future ability to pay is legal financial obligations?

II. STATEMENT OF THE CASE

Brian Tauscher¹ was charged by information on June 1, 2010 with three felony sex offenses. CP 53-56. Tauscher was charged in count one with rape of a child in the first degree, count two with incest in the first degree and count three with child molestation in the first degree. CP 53-56. Included in the original information was the allegation that Tauscher used his position of trust or confidence to facilitate the commission of the current offenses and the State also alleged the offenses were part of an ongoing pattern of sexual abuse of the same victim, who was under 18 years of age, including multiple incidents over a prolonged period of time. CP 53-56. In addition to the allegations in the

¹ Hereafter, Tauscher.

information, the State filed a Notice of Aggravating Factors for Purpose of Imposing Exceptional Sentence on June 22, 2010. Sup CP AF.²

The allegations stemmed from a report of child molestation by K.N.³ regarding her granddaughter, J.N. Sup CP APC. K.N. told Officer M. Henderson from the Chehalis Police Department that Tauscher, J.N.'s stepfather, may have molested J.N. Sup CP APC. J.N. had disclosed to K.N. that Tauscher had been touching her sexually. Sup CP APC. J.N. was seven years old on May 30, 2010 when the police were called in regards to the molestation complaint. Sup CP APC.

Officer Henderson spoke to J.N. who told him whenever mommy would leave the house Tauscher would touch her between the legs, underneath her clothes. Sup CP APC.

Detective Silva spoke to K.N. and J.N. at the Chehalis Police Department on May 30, 2010. Sup CP APC. J.N. disclosed that Tauscher had touched her "privates" on more than one occasion. Sup CP APC. J.N. said she remembered the touching happening

² The State will be filing a supplemental designation of Clerk's Papers to include the Notice of Aggravating Factors, which will be referred to as Sup CP AF and the affidavit of probable cause, which the State will refer to as Sup CP APC.

³ K.N., although not the victim in this case, will be referred to by her initials to protect the identity of the victim due to the familial relationship.

from the day they moved into their new house until that day, a period later determined to be approximately two years. Sup PC APC. J.N. told Detective Silva that she uses her “privates” to go to the bathroom. Sup CP APC. J.N. said the touching happened outside and inside her clothing and that Tauscher had put his finger inside her privates more than one time. Sup CP APC. J.N. said the touching happened all over the house and she would get candy if she let Tauscher touch her. Sup CP APC. J.N. also told Detective Silva that Tauscher had made her watch a movie that showed two girls sucking a man’s privates and he tried to get her to do that to him. Sup CP APC.

On July 16, 2010, as part of a plea agreement, the State filed an amended information charging Tauscher with one count of attempted child molestation in the first degree – domestic violence. CP 1-2. Tauscher signed a Statement of Defendant on Plea of Guilty to Sex Offense (SDPG). CP 57-68. The SDPG listed Tauscher’s offender score as nine and his standard range as a minimum of 111.75 months to 148.5 months with a maximum of life in prison. CP 58. The State’s sentencing recommendation is contained on the SDPG and attached to the form. CP 61, 66. On page 8 of the SDPG contains the following:

7. I plead guilty to:
count I Attempted Child Molestation in the First
Degree – Domestic Violence in the amended
information. I have received a copy of that
Information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to
any other person to cause me to make this plea.

10. No person has made promises of any kind to
cause me to enter this plea except as set forth in this
statement.

11. The judge has asked me to state what I did in my
own words that makes me guilty of this crime. This is
my statement: On or between 1/1/08 and 5/30/10 in
Lewis County, I attempted to touch the privates
(sexual organs) of J.J.N. for the purpose of my sexual
gratification, she is less than 12 years old, I am more
than 36 months older, and we are not married.

12. My lawyer has explained to me, and we have fully
discussed, all of the above paragraphs and the
“Offender Registration” Attachment. I understand
them all. I have been given a copy of this “Statement
of Defendant on Plea of Guilty.” I have no further
questions to ask the judge.

CP 64. Tauscher signed the SDPG as did his attorney, the deputy
prosecuting attorney and the judge. CP 64-65. Also attached to
the SDPG was the Sex Offender Registration attachment, which
notifies Tauscher of the sex offender registration requirements he
will have to follow as a result of his plea of guilty. CP 67-68.

On July 16, 2010, in open court, the trial court judge had the following colloquy with Tauscher:

Q. Mr. Tauscher, have you heard, understood, and agreed with everything your attorney told me so far?

A. Yes, sir.

Q. The first thing we need to deal with is the fact today the charge against you has been changed to one count of attempted child molestation in the first degree, domestic violence? Do you understand that?

A. Yes, sir.

Q. Have you had adequate time to review the new charge with your attorney?

A. Yes.

Q. I'm told you're considering entering a plea of guilty to that charge, is that what you think you're doing?

A. Yes, sir.

...

Q. Now, have you gone over each and every line of the statement of defendant on plea of guilty with Mr. Brown?

A. Yes, sir.

Q. Do you feel you understand it thoroughly?

A. Yes, sir.

Q. On the first page there is the name of the crime, attempted child molestation in the first degree, and the elements of that crime. The elements are what the state has to prove beyond a reasonable doubt for

you to be found guilty of this offense. Did you review the elements with Mr. Brown?

A. Yes, sir.

Q. Do you feel you understand them?

A. Yes, sir.

...

Q. Anyone force you to do this?

A. No, sir.

Q. Has anyone threatened harm to you or anyone else to cause you to enter this plea?

A. No, sir.

Q. Other than what the state has promised to recommend at sentencing, has anyone made any promises to you to cause you to enter this plea?

A. No, sir.

Q. In paragraph 11 you're asked to state what you did that makes you guilty of this offense. Here's what appears there: On or between 11/08 and 5/30, '10 in Lewis County, I attempted to touch the privates, parenthesis (sexual organs) of J.J.N. for the purpose of my sexual gratification. She is less than 12 years old, I'm more than 36 months older and we are not married. Is that your statement?

A. Yes, sir.

Q. Is it a true statement?

A. Yes, sir.

1RP 4-8.⁴ Tauscher pleaded guilty to the charge of attempted child molestation in the first degree, domestic violence. 1RP 8. The trial court stated, “I’ll find your plea is knowingly, intelligently, and voluntarily made with an understanding of the charges and consequences of the plea...” 1RP 8. Tauscher’s sentencing was set into August. 1RP 8.

On August 17, 2010, Tauscher filed a *pro se* motion for new court appointed counsel, specifically requesting Christopher Baum or Don McConnell. CP 70. The motion was dated July 27, 2010. The motion indicated Tauscher did not feel Mr. Brown, his court appointed attorney, was doing his job, did not call witnesses, went fishing, did not obtain video from CPS and did not inform Tauscher of the plea offer immediately. CP 71. There was a letter attached that stated, “To Whom it May Concern, I, Brian D. Tauscher am writing this letter to inform you that I am withdrawing my plea agreement that was made on the 16th of July!” CP 72. Tauscher stated there was new evidence that proved his innocence. CP 72. Tauscher also wrote a letter to the Honorable Judge Hunt requesting to withdraw his plea of guilty. CP 69. Tauscher wrote

⁴ There are two volumes of verbatim report of proceedings. The proceedings on July 16, 2010 and August 25, 2010 will be referred to as 1RP. The proceedings on July 26, 2011 will be referred to as 2RP.

“David Brown coerced [sic] me into taking a plea by telling me I should take the deal cause it is a good deal, and if I take the deal at least I know I’m getting out in a few year’s [sic].” CP 69. Tauscher also stated that Mr. Brown said if they took the case to a trial and the jury convicted him on all counts Tauscher would do life. CP 69.

On August 18, 2010, two motions were filed, Motion for Appointment of New Counsel, and Motion to Withdraw Guilty Plea. CP 73-79. Both motions were on Bartlett, Blair & Brown pleading paper and the signature line scratched out David Brown’s name and wrote in Brian Tauscher, Defendant. CP 73, 76. Both motions contained a declaration, typed and on Bartlett, Blair & Brown pleading paper, from Tauscher. CP 74, 77. Attached to the motions were Tauscher’s motion and letter already filed with on August 17, 2010. CP 75, 78-79.

On August 25, 2010 Tauscher’s matter was in front of the trial court for sentencing. 1RP 11. The trial court addressed Tauscher’s motions for new counsel and to withdraw his guilty plea. 1RP 11-13. The trial court asked Mr. Brown if there was anything he wanted to add to Tauscher’s motion. 1RP 11. Mr. Brown stated no but also stated, “As far as our relationship, I continue to work with Mr. Tauscher since he filed these motions.” 1RP 11-12. The

trial court next inquired if Tauscher wished to be heard. 1RP 12. Tauscher responded, "I feel with proper representation I have a good chance of going to trial and beating this." 1RP 12. The trial court next inquired:

THE COURT: So why did you plead guilty then?

THE DEFENDANT: I felt I was pushed into it.

THE COURT: By whom and how?

THE DEFENDANT: By Mr. Brown.

THE COURT: What he do to push you into it?

THE DEFENDANT: He told me if I didn't do the deal I would be doing life without parole.

THE COURT: Which is entirely possible. You told the judge, me, all of us, that you were pushed into it, you didn't want to plead? This was totally involuntary when we went through the plea.

THE DEFENDANT: Yes, sir.

THE COURT: You told me that? No, of course you didn't tell me that. I'm talking about when you did your plea.

THE DEFENDANT: Sorry, sir.

THE COURT: You didn't, did you?

THE DEFENDANT: No.

THE COURT: There is no basis to withdraw the plea as far as I can see so I'll deny both motions.

1RP 12-13. Tauscher signed a stipulation on prior criminal record and offender score, agreeing that he had two out of state convictions that counted towards his offender score. CP 80-82. Everyone believed Tauscher's standard range was a minimum of 111.75 to 148.5 months and a maximum of life. 1RP 13, 15, 21-23; CP 6-8, 80-82. The agreed recommendation between the parties was 114, which the trial court followed. 1RP 13-23; CP 8.

On November 5, 2010 Tauscher filed a Motion to Modify or Correct Judgment and Sentence. CP 83-85. Tauscher alleged he had been sentenced using the wrong offender score and was requesting the court resentence him with the corrected offender score within the appropriate standard range. CP 83-85. At some point Tauscher was appointed new counsel, Kenneth Johnson, who filed an Amended Motion to Modify or Correct Judgment and Sentence. CP 86-99. The amended motion asked the trial court to correct the judgment and sentence by resentencing Tauscher within the standard range after removing two convictions that were included in his offender score in the August 2010 judgment and sentence. CP 86. The motion alleged Tauscher's convictions for Lewd or Lascivious Acts and Grand Theft, both out of California, should not have been included in Tauscher's offender score and his

proper offender score is five, thereby giving a standard range of 57.75 to 76.5 months. CP 86. A Memorandum of Fact and Authority was filed on July 15, 2011 by Tauscher's new attorney. CP 100-105. Tauscher argued that the out of state convictions from California were not comparable to Washington felonies. CP 100-105.

The State filed a response to Tauscher's resentencing motion and memorandum. CP 106-108. The State argued that Tauscher should have an offender score of six and that the California conviction for Grand Theft was comparable to the Washington felony of Theft of Livestock in the Second Degree under former 9A.56.080. CP 106-108.

A hearing was held on July 26, 2011 regarding Tauscher's resentencing motion. See 2RP. The State conceded that the California conviction for lewd and lascivious acts was not comparable to a Washington felony. 2RP 4. The only issue of controversy at the hearing was whether the California Grand Theft conviction was comparable to a Washington felony. The trial court concluded that the California Grand Theft conviction was comparable to a felony in Washington. 2RP 7-8. Tauscher's former judgment and sentence was vacated. CP 109-110. A new

judgment and sentence was entered, with a corrected offender score of six, which gave Tauscher a standard range of a minimum of 73.5 to 97.5 months and a maximum of life. CP 21. The trial court sentenced Tauscher to high end of the standard range, a minimum of 97.5 months to a maximum term of life. CP 23.

III. ARGUMENT

A. TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO APPOINT TAUSCHER NEW COUNSEL AFTER TAUSCHER ENTERED HIS GUILTY PLEA.

The Sixth Amendment of the United States Constitution guarantees that in a criminal prosecution the accused shall have the assistance of counsel to aid in his or her defense. The Washington State Constitution similarly provides that in a criminal prosecution the accused shall have the right to appear and defend themselves in person or by counsel. Const. art. I § 22.

The right to counsel extends to all critical stages of a criminal prosecution. *State v. Davis*, 125 Wn. App. 59, 64, 104 P.3d 11 (2004). A motion to withdraw a guilty plea pursuant to CrR 4.2(f) is a critical stage of a criminal prosecution. *Id.* at 64-65.

While a defendant in a criminal action has a right to counsel for all critical stages, a defendant does not necessarily have the right to counsel of his or her choosing. *State v. DeWeese*, 117

Wn.2d 369, 375-76, 816 P.2d 1 (1991) (citation omitted). Denial of counsel by the trial court during a critical stage of the prosecution of a criminal defendant is presumptively prejudicial. *State v. Chavez*, 162 Wn. App. 431, 439, 257 P.3d 1114 (2011). Whether a defendant's dissatisfaction with his or her court appointed counsel warrants appointment of new counsel is within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. *State v. Rosborough*, 62 Wn. App. 341, 346, 814 P.2d 679 (1991) (citations omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The trial court should consider the court's evaluation of existing counsel's competence, the defendant's reason for dissatisfaction and the effect substitution of counsel will have upon scheduled proceedings. *State v. Rosborough*, 62 Wn, App. at 346.

In *Chavez* the defendant was represented by one attorney, Mr. Zeigler, who assisted Chavez in pleading guilty to violations of a no contact order. Mr. Zeigler, due to his own conduct, became a potential witness in regards to a witness tampering charge against

Chavez. Chavez was appointed alternative counsel for the witness tampering charge, which was severed from the other criminal charges pending against Chavez. Chavez next requested to withdraw his guilty pleas for the violations of the no contact order, alleging Mr. Ziegler was ineffective. The trial court appointed Mr. Mendoza, the counsel for the witness tampering case. Mr. Mendoza filed what he termed an *Anders*⁵ brief in support of the motion to withdraw Chavez's guilty plea. *State v. Chavez* 162 Wn. App. at 436-37. The court held that Mr. Mendoza's actions, by submitting a brief on Chavez's behalf stating there was no merit in Chavez's motion to withdraw his guilty plea was in essence denying Chavez the right to counsel and therefore was ineffective. *Id.* at 440.

In the present case, Tauscher did have counsel during every critical stage of the prosecution. Tauscher argues that because he was claiming that Mr. Brown was ineffective that Mr. Brown could no longer represent Tauscher in Tauscher's attempt to withdraw his guilty plea due to a conflict of interest. Brief of Appellant at 9. This argument for a per se rule that a claim of ineffectiveness of one's

⁵ See, *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967), regarding when an attorney feels there are no issues of merit for an appeal and the attorney therefore wants to withdraw and have the appeal dismissed.

attorney by a defendant automatically creates an inherent conflict of interest which requires substitution of counsel has been previously rejected by the courts. *State v. Rosborough*, Wn. App. at 346 (citations omitted).

Tauscher did file a *pro se* motion for new court appointed counsel and a letter indicating his desire to withdraw his guilty plea. CP 70-72. Tauscher also sent a letter to Judge Hunt asking for a motion to withdraw his guilty plea and complaining about his dissatisfaction with Mr. Brown. CP 69. Yet, it is obvious Mr. Brown also aided Tauscher in drafting a motion for appointment of new counsel. CP 73-75. This motion, while signed by Tauscher, was drafted on Mr. Brown's firm's pleading paper. CP 73-74. The motion contained the criminal rule, CrR 3.1, that the motion was based upon and contained a typed declaration that Tauscher signed. CP 73-74. Tauscher clearly did not create these documents, Mr. Brown did on Tauscher's behalf and gave them to Tauscher for his signature. Mr. Brown also aided Tauscher in drafting a motion to withdraw guilty plea. CP 76-79. Similar to the motion for appointment of new counsel, the motion to withdraw guilty plea was on Bartlett, Blair & Brown pleading paper, with Mr. Brown's name crossed out on the signature line and Tauscher's

name written in. CP 76. The motion cited the proper criminal rule, CrR 4.2(f), it was based upon. CP 76. There is also a typed declaration from Tauscher regarding his motion to withdraw guilty plea that is signed by Tauscher, again on Bartlett, Blair & Brown pleading paper. CP 77. It is clear that Mr. Brown prepared these documents for Tauscher, even if Mr. Brown's signature is not affixed to the documents. At the sentencing hearing the trial court asked Mr. Brown if he had anything to say regarding Tauscher's motions. RP 11. Mr. Brown stated, "No, I don't think there is anything in the motion to respond to. As far as our relationship, I continue to work with Mr. Tauscher since he filed these motions." RP 11-12.

Tauscher alleged to the trial court that Mr. Brown had pushed Tauscher into taking the plea deal, which reduced the charges from one count of rape of a child in the first degree, one count of incest and one count of child molestation in the first degree to one count of attempted child molestation in the first degree – domestic violence. 1RP 12. Tauscher stated that he felt if he had proper representation he would have a good chance of beating the charges at trial. 1RP 12. Tauscher further stated, "He [Mr. Brown] told me if I didn't do the deal I would be doing life without parole."

1RP 12. The trial court pointed out that Tauscher did not raise any of this when he pleaded guilty. 1RP 12. The trial court denied Tauscher's motion for new counsel and his motion to withdraw his guilty plea. 1RP 13.

Tauscher's apparent dissatisfaction with his attorney did not create an inherent conflict of interest. Mr. Brown continued to work on Tauscher's behalf, even though Tauscher alleged Mr. Brown was ineffective. The court denied Tauscher's motions, both for new counsel and to withdraw his guilty plea. The denial to appoint new counsel did not leave Tauscher without counsel during a critical stage of the proceedings, Tauscher had counsel, Mr. Brown. While Tauscher may have preferred alternative counsel, he specifically asked for Chris Baum or Don McConnell, an indigent defendant has the right to an attorney, not a right to the attorney of his or her choosing. *See State v. DeWeese*, 117 Wn.2d at 375-76.

Tauscher argues that his allegations that Mr. Brown had failed to investigate the case and "had (erroneously) informed him that he'd face a sentence of life without parole if convicted following trial" establish grounds for relief and thereby new counsel must be appointed. Brief of Appellant 10. The trial court had the opportunity to review all the documentation and the judge who took

the plea was the same judge who denied Tauscher's motions. See 1RP. The trial court was obviously aware that the State, if it had succeeded at trial on all counts, with the aggravating factors, could have asked the trial court to sentence Tauscher to an exceptional sentence and therefore could have asked the trial court to sentence Tauscher to life in prison. 1RP 12; CP 53-57; Sup CP AF. The trial court was also aware of Tauscher's counsel's competence and performance in the case so far. Tauscher's trial counsel negotiated with the State to reduce two class A felonies and one class B felony, all sex offenses, down to one class B sex offense. CP 1-2, 53-57. The trial court did not abuse its discretion when it denied Tauscher's motion for new counsel. This court should affirm Tauscher's conviction and sentence.

B. TAUCHER'S GUILTY PLEA WAS MADE KNOWINGLY, VOLUNTARILY AND INTELLEAGENTLY.

Guilty pleas may only be accepted by the trial court after a determination of the voluntariness of the plea is made. CrR 4.2(d). Due process requires that a defendant in a criminal matter must understand the nature of the charge or charges against him or her and may only enter a plea to the charge(s) voluntarily and knowingly. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citations omitted). The court rule requires a plea be "made

voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Prior to acceptance of a guilty plea, “[a] defendant must be informed of all the direct consequences of his plea.” *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (citations and internal quotations omitted). A defendant need not show a direct consequence in which he or she was uninformed about was material to his or her decision to plead guilty. *In re Isadore*, 151 Wn.2d 294, 301, 88 P.3d 390 (2004).

A direct consequence of pleading guilty to a charge is the length of the sentence. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006). A meeting of the minds in regards to the sentencing range is required for a guilty plea to be knowing, voluntary and intelligently made. *Id.* “Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated.” *Id.* at 591. The Supreme Court in *Mendoza* did hold that when a defendant is informed of the corrected lower sentencing range prior to

sentencing and has the opportunity to withdraw his or her plea, a challenge to the validity of the plea may be waived. *Id.*

In *Mendoza* the defendant was informed of the corrected lowered standard range prior to sentencing and did not object to the State's lower sentencing recommendation. *Id.* at 592. Mendoza did seek to withdraw his guilty plea on other grounds, but Mendoza never mentioned the sentencing range correction as one of his reasons for requesting to withdraw his plea of guilty. *Id.* The Supreme Court held that Mendoza had waived his right to challenge the voluntariness of his plea. *Id.*

In the current case, Tauscher never requested to withdraw his guilty plea due to the incorrect offender score. See 1RP 12-13; 2RP; CP 69-79; 83-105. Tauscher's initial request to withdraw his guilty plea stemmed from his alleged dissatisfaction with his trial counsel. 1RP 12-13; CP 69-79. The motion Tauscher filed to correct his offender score and modify his judgment and sentence was that and nothing more. See 2RP; CP 83-105. Tauscher argued that two of prior convictions were erroneously included in his offender score and therefore, he must be resentenced within the correct sentencing range. *Id.* Tauscher was appointed new trial counsel to assist him in this motion to modify the judgment and

sentence. Nowhere in the briefing or the argument before the trial court does Tauscher's trial counsel request or motion the court to allow Tauscher to withdraw his guilty plea based on the miscalculated offender score. 2RP 4-8, 11-12; CP 86-105.

Therefore, pursuant to *Mendoza*, Tauscher has waived his right to challenge the voluntariness of his guilty plea and this court should affirm Tauscher's plea and sentence.

C. TAUSCHER'S OUT OF STATE CONVICTION WAS PROPERLY COUNTED BY THE TRIAL COURT; THEREFORE TAUSCHER WAS SENTENCED USING THE CORRECT OFFENDER SCORE.

In a sentencing hearing, "[a] criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.150. The State must prove a defendant's prior criminal convictions by a preponderance of the evidence. *State v. Jackson*, 129 Wn. App. 95, 105, 117 P.3d 1182 (2005), citing *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1991). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004)(citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

When calculating a person's offender score for purposes of sentencing, "[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). A foreign conviction is equivalent to a Washington offense if there is either a legal or factual comparability. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). If the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or the information, to determine whether the conduct would have violated the comparable Washington statute. *State v. Duke*, 77 Wn. App. 532, 535, 504 P.2d 1174 (1973).

Tauscher argues that his conviction for grand theft out of California is not comparable to a felony offense in Washington. Brief of Appellant 14. The point of contention appears to be that the California statute refers only to the carcass of an animal and Tauscher argues the Washington statute for theft of livestock refers only to live animals. Brief of Appellant 16-18.

Tauscher was convicted of grand theft in California in 1995. See CP 95-98. The California statute Tauscher was convicted

under was California Penal Code, Section 487a. The statute states:

(a) Every person who shall feloniously steal, take, transport or carry the carcass of any bovine, caprine, equine, ovine, or suine animal or of any mule, jack or jenny, which is the personal property of another, or who shall fraudulently appropriate such property which has been entrusted to him, is guilty of grand theft.

(b) Every person who shall feloniously steal, take, transport, or carry any portion of the carcass of any bovine, caprine, equine, ovine, or suine animal or of any mule, jack, or jenny, which has been killed without consent of the owner thereof, is guilty of grand theft.

CPC § 487a. This statute is legally comparable to the Washington felony crime of theft of livestock in the second degree under former RCW 9A.56.080, in effect when Tauscher's California conviction for grand theft occurred.

(1) Every person who, with intent to sell or exchange and to deprive or defraud the lawful owner thereof, willfully takes, leads, or transports away, conceals, withholds, slaughters, or otherwise appropriates any horse, mule, cow, heifer, bull, steer, swine, or sheep is guilty of theft of livestock in the first degree.

(2) A person who commits what would otherwise be theft of livestock in the first degree but without intent to sell or exchange, and for the person's own use only, is guilty of theft of livestock in the second degree.

(3) Theft of livestock in the first degree is a class B felony.

(4) Theft of livestock in the second degree is a class C felony.

RCW 9A.56.080.⁶ While the California statute only addresses dead animals, the Washington statute does state that a person who deprives or defrauds the lawful owner of his or her livestock by way of slaughtering the livestock the person is guilty of theft of livestock. RCW 9A.56.080. Tauscher argues that livestock must necessarily be alive, due to the dictionary definition of livestock. Yet, the term livestock is used not necessarily to indicate the animals are currently living. On a farm or ranch the term deadstock refers to “farm tools and equipment – opposed to *livestock*.” Webster’s Third New International Dictionary, 580. Livestock is raised and slaughtered on a farm and common sense would dictate that if a person “slaughters, or otherwise appropriates” livestock under the Washington statute, that would encompass stealing livestock carcass, which is what is required under the California statute. See RCW 9A.56.080; CPC 487a. The two statutes are comparable and the California conviction for grand theft is the equivalent to a felony in Washington and should be included in Tauscher’s offender score. This court should affirm Tauscher’s sentence.

⁶ This is the statute as it existed in 1995. RCW 9A.56.080 currently applies only to theft of livestock in the first degree and RCW 9A.56.083 applies to theft of livestock in the second degree.

D. THE STATE CONCEDES THAT THE RECORD CONTAINS NO FINDINGS REGARDING TAUSCHER'S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.

The State concedes there were no formal findings made by the trial court regarding Tauscher's present or future ability to pay his legal financial obligations. Therefore, pursuant to *State v. Bertrand*, __ Wn. App. __, 267 P.3d 511 (2011), Tauscher's case should be remanded back to the trial court to correct the judgment and sentence by vacating that finding.

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IV. CONCLUSION

For the foregoing reasons, this court should affirm Tauscher's conviction attempted child molestation in the first degree - domestic violence. Tauscher's sentence should be affirmed and this court should remand the case back only to correct the improper finding that Tauscher has the present and future ability to pay his legal financial obligations.

RESPECTFULLY submitted this 28th day of February, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

February 28, 2012 - 11:50 AM

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