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Court of Appeals
Division III
State of Washington

31823-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EARL ANTHONY NAVARETTE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. Defense counsel violated Mr. Navarette's Sixth Amendment right to effective assistance of counsel by failing to object to the inclusion of four prior California convictions in his offender score without a comparability analysis.
2. The judgment and sentence erroneously states that for count 1, Mr. Navarette was found guilty of theft of a motor vehicle, a Class B felony, with a special allegation of attempt, and a maximum term of confinement of ten years, where the jury found Mr. Navarette guilty of attempted theft of a motor vehicle, a Class C felony, with a maximum term of confinement of five years.

B. ISSUES

1. At sentencing, the State asserted that Mr. Navarette had an offender score of nine, and provided certified copies of documents showing that Mr. Navarette had nine prior felony convictions, five in California and four in Washington. Defense counsel told the trial court he was satisfied that Mr. Navarette had an offender score of nine. The trial court did not conduct a comparability analysis of the out-of-state convictions, and defense counsel did not object. All five of the out-of-state convictions were included in Mr.

Navarette's offender score, and Mr. Navarette was sentenced based upon an offender score of nine. Was Mr. Navarette's Sixth Amendment right to effective assistance of counsel violated?

2. For count 1, the jury found Mr. Navarette guilty of attempted theft of a motor vehicle, a Class C felony, carrying a maximum term of confinement of five years. The Judgment and Sentence states that Mr. Navarette was found guilty of theft of a motor vehicle, a Class B felony, with a special allegation of attempt. The Judgment and Sentence also lists the maximum term of confinement for count 1 as ten years. Should these errors be corrected?

C. STATEMENT OF THE CASE

The State charged Earl Anthony Navarette with three counts: count 1, attempted theft of a motor vehicle; count 2, malicious mischief in the third degree; and count 3, criminal trespass in the second degree. (CP 109-111) A jury found Mr. Navarette guilty as charged. (CP 142-144; RP¹ (Apr. 18, 2013) 153-160)

At the sentencing hearing, the State asserted that Mr. Navarette had an offender score of nine. (RP 8-9) The State provided certified copies of

¹ The Report of Proceedings consists of three consecutively paginated volumes, containing the jury trial, and one separate volume, containing motion hearings and the sentencing hearing. References to "RP" herein refer to the one separate volume. References to the three consecutively paginated volumes include the date.

documents showing that Mr. Navarette had nine prior felony convictions, five in California and four in Washington. (CP 147-213; RP 8-9)

When asked by the trial court if he disagreed with the State's offender score calculation, defense counsel stated "I'm satisfied that he has an offender score of nine." (RP 9) The trial court did not conduct a comparability analysis to determine whether the five California convictions were comparable to Washington offenses. (RP 8-20) Defense counsel did not object to the trial court not conducting a comparability analysis. (RP 8-20)

In calculating Mr. Navarette's offender score, the trial court included these four California convictions: a 1983 first degree burglary conviction; a 1987 attempted first degree burglary conviction; a 1990 second degree burglary conviction; and a 1992 assault conviction.² (CP 148-172, 216; RP 8-20)

The documents submitted by the State to show Mr. Navarette's prior felony convictions show that the three California burglary convictions were under Cal. Penal Code § 459, and that the assault conviction was under Cal. Penal Code § 4501. (CP 148-172) The documents also include the Information for the 1990 California second degree burglary conviction. (CP 166-167) The documents show that for this charge, Mr. Navarette entered a plea of *nolo contendere* to a

² The trial court also included a fifth California conviction in Mr. Navarette's offender score, for possession of a controlled substance. (CP 173-175, 216; RP 8-20) The inclusion of this conviction in Mr. Navarette's offender score is not challenged here.

lesser included offense of non-residential second degree burglary, under Cal. Penal Code §§ 459 and 460(2). (CP 158-164)

The trial court sentenced Mr. Navarette, based on an offender score of nine, to 37.5 months' confinement on count 1. (CP 216-218; RP 17) The Judgment and Sentence states that Mr. Navarette was found guilty of theft of a motor vehicle, a Class B felony, with a special allegation of attempt. (CP 214) The judgment and sentence also lists the maximum term of confinement for count 1 as ten years. (CP 217)

Mr. Navarette appealed. (CP 240-259)

D. ARGUMENT

1. DEFENSE COUNSEL VIOLATED MR. NAVARETTE'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE INCLUSION OF FOUR PRIOR CALIFORNIA CONVICTIONS IN HIS OFFENDER SCORE WITHOUT A COMPARABILITY ANALYSIS.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Under the Sentencing Reform Act of 1981 (SRA), a defendant's offender score establishes his standard range sentence. RCW 9.94A.503(1). "To properly calculate a defendant's offender score, the SRA requires that sentencing courts determine a defendant's criminal history based on his or her prior convictions and the level of seriousness of the current offense." *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (*citing State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994)). In order for prior out-of-state convictions to be included in a defendant's offender score, the SRA requires that the "[o]ut-of-state convictions . . . be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3).

"Washington law employs a two-part test to determine the comparability of a foreign offense." *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the sentencing court must determine whether the foreign conviction

is legally comparable, by asking “whether the elements of the foreign offense are substantially similar to the elements of the Washington offense.” *Id.* Second, “[i]f the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must determine whether the offense is factually comparable – that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.” *Id.* (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). “In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.” *Id.* It is the State’s burden to prove, by a preponderance of the evidence, the comparability of a defendant’s prior out-of-state conviction. *Ross*, 152 Wn.2d at 230.

In *Thiefault*, our Supreme Court held that the failure to object to a deficient comparability analysis of a prior Montana conviction constituted ineffective assistance of counsel. *Thiefault*, 160 Wn.2d at 417. The Court found that the defendant’s attorney provided deficient representation under the first prong of the *Strickland* test when he did not object to the sentencing court’s inadequate comparability analysis. *Id.*; see also *Strickland*, 466 U.S. at 687. The Court reasoned that the prior Montana conviction was not legally or factually comparable to a Washington offense. *Id.* The Montana conviction was not legally comparable, because the Montana statute at issue was broader than its

Washington counterpart. *Id.* And, the documents submitted by the State at sentencing were insufficient to establish factual comparability. *Id.*

The *Thiefault* court further found that the defendant was prejudiced by his attorney's deficient representation, because "[a]lthough the State may have been able to obtain a continuance and produce the information to which [Mr.] Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable" *Id.* The Court vacated Mr. Thiefault's sentence, and remanded the case to the trial court to determine whether the Montana conviction was factually comparable to a Washington offense. *Id.* at 417, 420.

Here, as in *Thiefault*, Mr. Navarette received ineffective assistance of counsel when his defense counsel failed to object to the inclusion of four prior California convictions in his offender score. The four prior California convictions are addressed in turn below.

- a. Defense Counsel Violated Mr. Navarette's Sixth Amendment Right To Effective Assistance Of Counsel By Failing To Object To The Inclusion Of The Three California Burglary Convictions In His Offender Score Without A Comparability Analysis.

Defense counsel's failure to object to the inclusion of the 1983 California first degree burglary conviction, the 1987 California attempted first degree burglary conviction, and the 1990 California second degree burglary conviction in

Mr. Navarette's offender score was deficient performance, because these convictions were neither legally nor factually comparable to a Washington burglary.

First, the three California burglary convictions included in Mr. Navarette's offender score are not legally comparable to a Washington burglary. The documents submitted by the State to show Mr. Navarette's prior felony convictions show that the three California burglary convictions were under Cal. Penal Code § 459. (CP 148-168). This provision states, in relevant part:

Every person *who enters* any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459 (emphasis added).³

Thus, in a California burglary, any entry made with intent to commit larceny or any felony is unlawful. Cal. Penal Code § 459; *see also*

³ Although this statute was amended several times during the time frame of the prior convictions challenged here, 1983 to 1990, the amendments do not affect the argument made here by Mr. Navarette. *See* Stats. 1984, c. 854, § 2; Stats. 1987, c. 344, § 1; Stats. 1989, c. 357, § 2.

State v. Thomas, 135 Wn. App. 474, 486, 144 P.3d 1178 (2006). Unlawful entry is not an element of the California crime of burglary. Cal. Penal Code § 459; *see also Thomas*, 135 Wn. App. at 486. However, in a Washington burglary, the entry itself must be independently unlawful. RCW 9A.52.010(5) (defining “[e]nters or remains unlawfully.”); RCW 9A.52.020 (first degree burglary); RCW 9A.52.025 (residential burglary); RCW 9A.52.030 (second degree burglary); *see also Thomas*, 135 Wn. App. at 486. Thus, California burglary convictions under Cal. Penal Code § 459 are not legally comparable to the crime of burglary in Washington. *See Thomas*, 135 Wn. App. at 483, 486; *see also In re Pers. Restraint of Rowland*, 149 Wn. App. 496, 507, 204 P.3d 953 (2009) (a 1985 California burglary conviction is not legally comparable to a Washington burglary).

Second, the three California burglary convictions included in Mr. Navarette’s offender score are not factually comparable to a Washington burglary. For the 1983 California first degree burglary conviction and the 1987 California attempted first degree burglary conviction, the documents submitted by the State were insufficient to establish factual comparability. (CP 148-157); *see also Thieffault*, 160 Wn.2d at 417. The State’s documents did not include the charging documents, or any information regarding the facts of these crimes. (CP 148-157) In the absence of court records showing unlawful entry, as required in Washington, was proved beyond a reasonable doubt, the 1983 California first

degree burglary conviction and the 1987 California attempted first degree burglary conviction are not factually comparable to a Washington burglary. *See Thomas*, 135 Wn. App. at 487.

For the 1990 California second degree burglary conviction, the documents submitted by the State were also insufficient to establish factual comparability. (CP 158-168); *see also Thieffault*, 160 Wn.2d at 417. The documents included the Information, which states:

The District Attorney of the County of Alameda hereby accuses EARL ANTHONY NAVARETTE of a felony, to wit: RESIDENTIAL BURGLARY, a violation of Section 459 of the Penal Code of California, in that on or about the 22nd day of March, 1990, in the County of Alameda, State of California, said defendant did then and there *enter* the inhabited dwelling house occupied by JOHN CUMMINGS located at 820 Haight Street, in the City of Alameda, County of Alameda, State of California, with intent to commit theft therein.

(CP 166) (emphasis added).

The Information shows that Mr. Navarette was not charged with unlawful entry, as required in Washington. (CP 166); *cf. State v. Winings*, 126 Wn. App. 75, 95-96, 107 P.3d 141 (2005) (the State proved a California burglary was comparable to a Washington burglary, where the defendant pleaded guilty to a complaint charging he unlawfully entered a dwelling house).

The documents show that for the 1990 California second degree burglary conviction, Mr. Navarette entered a plea of *nolo contendere* to a lesser included offense of non-residential second degree burglary, under Cal. Penal Code §§ 459

and 460(2). (CP 158-164) This crime does not include unlawful entry, as required in Washington. *See* Cal. Penal Code § 459; Cal. Penal Code § 460(2). Further, in the absence of court records showing unlawful entry, as required in Washington, was proved beyond a reasonable doubt, the 1990 California second degree burglary conviction is not factually comparable to a Washington burglary. *See Thomas*, 135 Wn. App. at 487.

Defense counsel's failure to object to the inclusion of the 1983 California first degree burglary conviction, the 1987 California attempted first degree burglary conviction, and the 1990 California second degree burglary conviction in his offender score prejudiced Mr. Navarette. It was equally likely that documentation obtained by the State may or may not have provided facts sufficient to find the California burglaries factually comparable to a burglary in Washington. *See Thieffault*, 160 Wn.2d at 417. If the documentation did not provide facts sufficient to find the California burglaries factually comparable to a burglary in Washington, the trial court could not have included the California convictions in Mr. Navarette's offender score. *See* RCW 9.94A.525(3). Under these circumstances, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26).

Mr. Navarette has proved the two-prong test for ineffective assistance of counsel. His trial counsel's failure to object to the inclusion of the California

burglary convictions in his offender score was deficient performance, and he was prejudiced thereby.

This court should vacate Mr. Navarette's sentence for attempted theft of a motor vehicle, and remand the case to the trial court to conduct a factual comparability analysis of the 1983 California first degree burglary conviction, the 1987 California attempted first degree burglary conviction, and the 1990 California second degree burglary conviction. *See Thieffault*, 160 Wn.2d at 417, 420 (setting forth this remedy).

- b. Defense Counsel Violated Mr. Navarette's Sixth Amendment Right To Effective Assistance Of Counsel By Failing To Object To The Inclusion Of The 1992 California Assault Conviction In His Offender Score Without A Comparability Analysis.

Defense counsel's failure to object to the inclusion of the 1992 California assault conviction in Mr. Navarette's offender score was deficient performance.

First, the 1992 California assault conviction included in Mr. Navarette's offender score is not legally comparable to a Washington assault. The documents submitted by the State to show Mr. Navarette's prior felony convictions show that the 1992 California assault conviction was under Cal. Penal Code § 4501. (CP 169-172) This provision stated:

Every person confined in a state prison of this state except one undergoing a life sentence who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a

felony and shall be imprisoned in the state prison for two, four, or six years to be served consecutively.

Cal. Penal Code § 4501 (1992).

Assault is statutorily defined in California, as an “unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Cal. Penal Code § 240. It requires only “the general intent to willfully commit an act the direct, natural, and probable consequence of which if successfully completed would be the injury to another.” *People v. Colantuono*, 7 Cal.4th 206, 214, 26 Cal.Rptr.2d 908, 865 P.2d 704 (1994). For an assault conviction in California, the State does not need to prove a specific intent to inflict a particular harm. *See id.*; *see also People v. Rocha*, 3 Cal.3d 893, 899, 92 Cal.Rptr. 172, 479 P.2d 372 (1971) (holding that assault with a deadly weapon is a general intent crime).

“Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.” *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006). In Washington, assault is a specific intent crime. *In re Pers. Restraint of Carter*, 154 Wn. App. 907, 922, 230 P.3d 181 (2010), *rev’d on other grounds*, 172 Wn.2d 917, 263 P.3d 1241 (2011); *see also State v. Byrd*, 125 Wn.2d 707,

713, 887 P.2d 396 (1995). Therefore, Mr. Navarette's 1992 California assault conviction is not legally comparable to a Washington assault, because of the different intent elements. *See Carter*, 154 Wn. App. at 924.

Second, the 1992 California assault conviction included in Mr. Navarette's offender score is not factually comparable to a Washington assault. The documents submitted by the State were insufficient to establish factual comparability. (CP 169-172); *see also Thiefault*, 160 Wn.2d at 417. The State's documents did not include the charging document, or any information regarding the facts of this assault. (CP 169-172) Because the facts do not show that Mr. Navarette acted with specific intent, the 1992 California assault conviction is not factually comparable to a Washington assault. *See Carter*, 154 Wn. App. at 924.

Defense counsel's failure to object to the inclusion of the 1992 California assault conviction in his offender score prejudiced Mr. Navarette. It was equally likely that documentation obtained by the State may or may not have provided facts sufficient to find the California assault factually comparable to an assault in Washington. *See Thiefault*, 160 Wn.2d at 417. If the documentation did not provide facts sufficient to find the California assault factually comparable to an assault in Washington, the trial court could not have included the California assault conviction in Mr. Navarette's offender score. *See RCW 9.94A.525(3)*. Under these circumstances, the result of the proceeding would have been

different. *McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26).

Mr. Navarette has proved the two-prong test for ineffective assistance of counsel. His trial counsel's failure to object to the inclusion of the 1992 California assault conviction in his offender score was deficient performance, and he was prejudiced thereby.

This court should vacate Mr. Navarette's sentence for attempted theft of a motor vehicle, and remand the case to the trial court to conduct a factual comparability analysis of the 1992 California assault conviction. *See Thiefault*, 160 Wn.2d at 417, 420 (setting forth this remedy).

2. THE JUDGMENT AND SENTENCE ERRONEOUSLY STATES THAT FOR COUNT 1, MR. NAVARETTE WAS FOUND GUILTY OF THEFT OF A MOTOR VEHICLE, A CLASS B FELONY, WITH A SPECIAL ALLEGATION OF ATTEMPT, AND A MAXIMUM TERM OF CONFINEMENT OF TEN YEARS, WHERE THE JURY FOUND MR. NAVARETTE GUILTY OF ATTEMPTED THEFT OF A MOTOR VEHICLE, A CLASS C FELONY, WITH A MAXIMUM TERM OF CONFINEMENT OF FIVE YEARS.

Theft of a motor vehicle is a Class B felony. RCW 9A.56.065(2). An attempt to commit theft of a motor vehicle is a Class C felony. *See* RCW 9A.28.020(3)(c) (stating "[a]n attempt to commit a crime is a . . . Class C felony when the crime attempted is a Class B felony). The maximum term of confinement for a Class C felony is five years. RCW 9A.20.021(1)(c).

The judgment and sentence erroneously states that count 1 is theft of a motor vehicle, a Class B felony, with a special allegation of attempt, with a maximum term of confinement of ten years. (CP 214, 217) For count 1, Mr. Navarette was found guilty of attempted theft of a motor vehicle. (CP 142; RP 153-156) This is a Class C, not a Class B, felony. *See* RCW 9A.28.02(3)(c), RCW 9A.56.065(2). The maximum term of confinement for this offense is five years. RCW 9A.20.021(1)(c).

Therefore, the judgment and sentence should be corrected to state that Mr. Navarette was found guilty of attempted theft of a motor vehicle, a Class C felony, and that the maximum term of confinement for this offense is five years. *See, e.g., State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed); *In re Pers. Restraint of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (clerical or scrivener error may be corrected at any time, and the remedy is to remand for correction of the error).

E. CONCLUSION

This court should vacate Mr. Navarette's sentence for attempted theft of a motor vehicle, and remand the case to the trial court to conduct a factual comparability analysis of the following California prior convictions: the 1983 first

degree burglary conviction, the 1987 attempted first degree burglary conviction, the 1990 second degree burglary conviction, and the 1992 assault conviction.

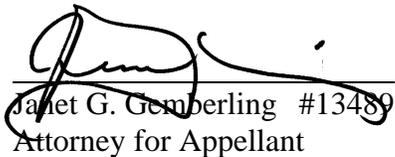
This court should also remand the case for correction of the errors in the Judgment and Sentence stating that Mr. Navarette was found guilty of theft of a motor vehicle, a Class B felony, with a special allegation of attempt, and a maximum term of confinement of ten years. The Judgment and Sentence should state that Mr. Navarette was found guilty of attempted theft of a motor vehicle, a Class C felony, with a maximum term of confinement of five years.

Dated this 6th day of January, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) No. 31823-1-III
)
 vs.)
)
EARL ANTHONY NAVARETTE,)
)
 Appellant.)

CERTIFICATE
OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that on January 6, 2014, I served a copy of the Appellant’s Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties’ agreement:

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Signed at Spokane, Washington on January 6, 2014.


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