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Court of Appeals
Division III
State of Washington

No. 32967-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY JOHN SCHERBERT,

Appellant.

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

The Honorable Judges Carrie Runge and Bruce Spanner

APPELLANT'S OPENING BRIEF

JILL S. REUTER, Of Counsel
KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorneys for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT1

B. ASSIGNMENTS OF ERROR.....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

D. STATEMENT OF THE CASE.....3

E. ARGUMENT.....6

Issue 1: Mr. Scherbert was denied his Sixth Amendment right to effective assistance of counsel when defense counsel: (1) stipulated, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense and (2) failed to object to the inclusion of the Nevada second degree murder conviction in his offender score without a comparability analysis.....6

Issue 2: The judgment and sentence contains four errors that should be corrected: the finding that Mr. Scherbert has the ability to pay legal financial obligations, the provision that Mr. Scherbert shall pay the costs of services to collect unpaid legal financial obligations, and the two community custody conditions.....17

F. CONCLUSION.....19

TABLE OF AUTHORITIES

United States Supreme Court

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....6, 11

Washington Supreme Court

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).....7

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009).....6, 7

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....7, 16

State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998).....10, 12, 14

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004).....9, 10

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009).....7

State v. Thieffault, 160 Wn.2d 409,
158 P.3d 580 (2007).....10, 11, 14, 15, 17

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).....7, 16

State v. Wiley, 124 Wn.2d 679, 880 P.2d 983 (1994).....9

Washington Courts of Appeal

State v. Healy, 157 Wn. App. 502, 237 P.3d 360 (2010).....17, 18, 19

State v. Latham, 183 Wn. App. 390, 335 P.3d 960 (2014).....8, 9, 12

State v. Naillieux, 158 Wn. App. 630, 241 P.2d 1280 (2010).....17, 18, 19

State v. Releford, 148 Wn. App. 478, 200 P.3d 729 (2009).....9

Washington State Statutes

RCW 9.41.010(3)(a).....	8
RCW 9.41.010(21)(a).....	8
RCW 9.41.010(21)(o).....	7, 8, 16
RCW 9.41.040(1)(a).....	7, 8, 15, 16
RCW 9.94A.525(3).....	8, 10, 16
RCW 9.94A.530(1).....	9
RCW 9.94A.703.....	18
RCW 9A.32.050(1) (1986).....	13, 14, 15
RCW 9A.32.050(2).....	8
RCW 10.73.160(3).....	17

Nevada Authorities

<i>Earl v. State</i> , 111 Nev. 1304, 904 P.2d 1029 (1995).....	14
<i>McCurdy v. State</i> , 107 Nev. 275, 809 P.2d 1265 (1991).....	14
N.R.S. 200.010 (1986).....	13, 14
N.R.S. 200.020 (1986).....	13, 14
N.R.S. 200.030 (1986).....	13, 14

A. SUMMARY OF ARGUMENT

Police officers found a black powder rifle and a black powder revolver in a truck belonging to Zachary John Scherbert. Mr. Scherbert was charged with two counts of unlawful possession of a firearm in the first degree. For purposes of the predicate offense for these charges, defense counsel stipulated that Mr. Scherbert had been convicted of a serious offense, second degree murder in Nevada. Mr. Scherbert was convicted as charged. At sentencing, the trial court counted the Nevada second degree murder in his offender score. The trial court did not conduct, and defense counsel did not request, a comparability analysis to determine whether the Nevada second degree murder conviction was comparable to a Washington offense. At sentencing, the trial court found Mr. Scherbert was unable to pay legal financial obligations, and it did not impose any community custody. Nonetheless, the Judgment and Sentence states that the trial court found Mr. Scherbert has the ability to pay legal financial obligations and that Mr. Scherbert shall pay the costs of services to collect unpaid legal financial obligations, and it also imposes two community custody conditions. Mr. Scherbert appeals.

B. ASSIGNMENTS OF ERROR

1. Mr. Scherbert was denied his Sixth Amendment right to effective assistance of counsel when defense counsel stipulated, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense.
2. Mr. Scherbert was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the inclusion of the Nevada second degree murder conviction in his offender score without a comparability analysis.
3. The judgment and sentence erroneously states the trial court found Mr. Scherbert has the ability to pay legal financial obligations.
4. The judgment and sentence erroneously states that Mr. Scherbert shall pay the costs of services to collect unpaid legal financial obligations.
5. The judgment and sentence erroneously imposes two community custody conditions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Mr. Scherbert was denied his Sixth Amendment right to effective assistance of counsel when defense counsel: (1) stipulated, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense and (2) failed to object to the inclusion of the Nevada second degree murder conviction in his offender score without a comparability analysis.

Issue 2: The judgment and sentence contains four errors that should be corrected: the finding that Mr. Scherbert has the ability to pay legal financial obligations, the provision that Mr. Scherbert shall pay the costs of services to collect unpaid legal financial obligations, and the two community custody conditions.

D. STATEMENT OF THE CASE

Police officers found a black powder rifle and a black powder revolver in a truck belonging to Zachary John Scherbert. (RP 22, 27-29, 32-33). Mr. Scherbert had previously been convicted of second degree murder in Nevada. (CP 22; RP 5-7, 28, 40).

The State charged Mr. Scherbert with two counts of unlawful possession of a firearm in the first degree. (CP 91-92). The charging document alleged Mr. Scherbert had previously been convicted of a serious offense, identified as “Murder in the Second Degree, NV, Cause #C139746X.” (CP 91-92). The case proceeded to a jury trial. (RP¹ 5-76).

On the morning of trial, defense counsel told the court the attorneys had stipulated that Mr. Scherbert’s prior Nevada conviction for second degree murder was a serious offense. (CP 80-81; RP 5-7). Defense counsel told the trial court Mr. Scherbert had pleaded guilty to this crime. (RP 5). The attorneys agreed that the stipulation be read to the jury during trial. (RP 6-7). The trial court did not conduct a comparability analysis to determine whether the Nevada second degree murder conviction was comparable to a Washington offense. (CP 80-81; RP 5-7).

¹ The Report of Proceedings consists of two separate volumes, one containing the jury trial and one containing a pre-trial hearing and the sentencing hearing. References to “RP” herein refer to the volume containing the jury trial. References to the other volume include the date.

Defense counsel did not object to the trial court not conducting a comparability analysis. (RP 5-7).

The stipulation was read to the jury. (CP 80-81; RP 40). For both counts, the trial court instructed the jury that in order to find Mr. Scherbert guilty, it had to find the following elements beyond a reasonable doubt:

- (1) That on or about October 3, 2014, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense;
- and
- (3) That the ownership or possession or control of the firearm occurred in the State of Washington.

(CP 70-71).

The jury found Mr. Scherbert guilty as charged. (CP 20-32, 34-35; RP 75).

At the sentencing hearing, the trial court sentenced Mr. Scherbert, based on an offender score of two, to 26 months confinement on each count, to run concurrently. (CP 22-27; 12/16/14 RP 6). In calculating his offender score, the trial court included Mr. Scherbert's Nevada second degree murder conviction. (CP 22; 12/16/14 RP 6). The State did not submit any documents as proof of this prior conviction. (CP 4-105; 12/16/14 RP 5-8). The Judgment and Sentence lists the date of the crime for this prior conviction as September 7, 1986. (CP 22).

Defense counsel did not object to the offender score calculation of two. (12/16/14 RP 5-8). The trial court did not conduct a comparability analysis to determine whether the Nevada second degree murder conviction was comparable to a Washington offense. (12/16/14 RP 5-8). Defense counsel did not object to the trial court not conducting a comparability analysis. (12/16/14 RP 5-8).

Also at sentencing, the trial court questioned Mr. Scherbert regarding his ability to support himself. (12/16/14 RP 6-7). Mr. Scherbert informed the trial court he has been unable to work. (12/16/14 RP 7). The trial court then stated: "I find that you are indigent, unable to pay the court costs." (12/16/14 RP 7). The trial court did not impose any legal financial obligations. (CP 24-25; 12/16/14 RP 5-8). The Judgment and Sentence included the following provisions:

The court finds:

That the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

.....

The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190 and RCW 9.94A.780(5).

(CP 23, 25).

The trial court did not impose a term of community custody. (CP 27-29; 12/16/14 RP 5-8). Under the section for community custody conditions, the Judgment and Sentence included the following provisions:

[X] Must consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence in which the offender lives or has exclusive/joint control/access.

....

[X] Other conditions: **COMPLY WITH ANY AND ALL CONDITIONS AS ORDERED BY THE DEPARTMENT OF CORRECTIONS.**

(CP 29).

Mr. Scherbert timely appealed. (CP 4-17).

E. ARGUMENT

Issue 1: Mr. Scherbert was denied his Sixth Amendment right to effective assistance of counsel when defense counsel: (1) stipulated, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense and (2) failed to object to the inclusion of the Nevada second degree murder conviction 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)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

“A person . . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense as defined in this chapter.” RCW 9.41.040(1)(a); *see also* (CP 70-71). “Serious offense” is defined, in relevant part, as “any . . . out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious offense.” RCW 9.41.010(21)(o). “Serious offense” includes a

crime of violence. RCW 9.41.010(21)(a). Second degree murder is a crime of violence. *See* RCW 9.41.010(3)(a) (Class A felonies are a crime of violence); RCW 9A.32.050(2) (“Murder in the second degree is a class A felony.”).

Here, for purposes of the unlawful possession of a firearm in the first degree charges, defense counsel stipulated that Mr. Scherbert’s prior Nevada conviction for second degree murder was a serious offense. (CP 80-81; RP 5-7). The trial court did not conduct, and defense counsel did not request, for purposes of the trial or at sentencing, a comparability analysis to determine whether the Nevada second degree murder conviction was comparable to a Washington offense. (CP 80-81; RP 5-7; 12/16/14 RP 5-8); *see, e.g., State v. Latham*, 183 Wn. App. 390, 397, 335 P.3d 960 (2014) (setting forth the two-part test for determining whether a foreign offense is comparable to a Washington offense). If Mr. Scherbert’s Nevada second degree murder conviction is not comparable to a Washington offense, (1) it cannot serve as the predicate offense to the unlawful possession of a firearm in the first degree charges, and (2) it also should not be included in his offender score. *See* RCW 9.41.040(1)(a) (defining unlawful possession of a firearm in the first degree); RCW 9.41.010(21)(o) (defining serious offense); RCW 9.94A.525(3) (when

prior out-of-state convictions can be included in a defendant's offender score).

The same legal test is used to determine comparability of an out-of-state offense for use as a predicate offense to unlawful possession of a firearm as well as for determining comparability of an out-of-state offense for sentencing purposes. *See State v. Releford*, 148 Wn. App. 478, 486-489, 200 P.3d 729 (2009) (applying the test used in the sentencing context to determine whether the defendant's prior out-of-state convictions could be used as the predicate offense for the charge of unlawful possession of a firearm in the first degree); *see also Latham*, 183 Wn. App. at 397 (setting forth the test used in the sentencing context).

Under the Sentencing Reform Act of 1981 (SRA), a defendant's offender score establishes his standard range sentence. RCW 9.94A.530(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 *Thieffault*, our Supreme Court held that the failure to object to a deficient comparability analysis of a prior Montana conviction constituted ineffective assistance of counsel. *Thieffault*, 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, the evidence presented in the trial court showed Mr. Scherbert pleaded guilty in Nevada to one count of second degree murder that occurred in 1986. (CP 22, 91-92; RP 5). The State did not submit

any documents as proof of this prior conviction. (CP 4-105; 12/16/14 RP 5-8).

Defense counsel's stipulation, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense² and defense counsel's failure to object to the inclusion of the Nevada second degree murder conviction in his offender score without a comparability analysis was deficient performance.

First, the Nevada second degree murder conviction used as the predicate offense for Mr. Scherbert's unlawful firearm possession charge, which was also included in Mr. Scherbert's offender score, is not legally comparable to second degree murder in Washington.

In determining comparability to a Washington offense, "[t]he statutes effective at the time the defendant committed the foreign offense control our analysis." *Latham*, 183 Wn. App. at 397 (citing *Morley*, 134 Wn.2d at 606). In 1986, Washington defined second degree murder as follows:

² It is true that "[u]nder the waiver doctrine, once a defendant enters into a stipulation, he or she waives the right to require the government to prove its case on the stipulated element." *State v. Stevens*, 137 Wn. App. 460, 466, 153 P.3d 903 (2007) (citing *State v. Wolf*, 134 Wn. App. 196, 199, 139 P.3d 414 (2006)). However, the waiver doctrine does not apply here to bar Mr. Scherbert from arguing the predicate offense is not comparable to a Washington offense, because he is arguing his trial counsel was ineffective in entering the stipulation, without requiring the trial court to engage in a comparability analysis.

A person is guilty of murder in the second degree when:
(a) *With intent to cause the death of another person* but without premeditation, he causes the death of such person or of a third person; or
(b) He commits or attempts to commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants

RCW 9A.32.050(1) (1986) (emphasis added).

In 1986, Nevada defined second degree murder as “all other kinds of murder” not specified as first degree murder. N.R.S. 200.030 (1986).

Nevada defined murder as follows:

Murder is the unlawful killing of a human being, *with malice aforethought, either express or implied*, or caused by a controlled substance which was sold to a person in violation of chapter 453 of NRS. The unlawful killing may be effected by any of the various means by which death may be occasioned.

N.R.S. 200.010 (1986) (emphasis added).

Malice was defined as follows:

1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
2. Malice shall be implied when no considerable provocation appears, *or when all the circumstances of the killing show an abandoned and malignant heart.*

N.R.S. 200.020 (1986) (emphasis added).

In Nevada, second degree murder based on implied malice “does not require an intentional killing but, rather, killing under circumstances

which ‘show an abandoned and malignant heart.’” *Earl v. State*, 111 Nev. 1304, 1314, 904 P.2d 1029 (1995) (J. Springer, dissenting); *see also McCurdy v. State*, 107 Nev. 275, 278, 809 P.2d 1265 (1991) (finding sufficient evidence to support the defendant’s conviction for second degree murder, where the evidence showed the defendant never possessed a specific intent to kill).

The elements of second degree murder in Nevada are not substantially similar to the elements of second degree murder in Washington. *See Thieffault*, 160 Wn.2d at 415. The elements of second degree murder in Nevada are broader than second degree murder in Washington. *See Thieffault*, 160 Wn.2d at 415 (citing *Morley*, 134 Wn.2d at 606). While Washington requires intent to kill, a defendant in Nevada can be convicted of second degree murder without a specific intent to kill, but rather, “an abandoned and malignant heart.” *See* RCW 9A.32.050(1) (1986); N.R.S. 200.010 (1986); N.R.S. 200.020 (1986); N.R.S. 200.030 (1986); *Earl*, 111 Nev. at 1314 (J. Springer, dissenting); *McCurdy*, 107 Nev. at 278. Therefore, Mr. Scherbert’s Nevada second-degree murder conviction is not legally comparable to second-degree murder in Washington.

Second, the Nevada second degree murder conviction used as the predicate offense for Mr. Scherbert’s first-degree unlawful possession of a

firearm charge and included in Mr. Scherbert's offender score is not factually comparable to second-degree murder in Washington. The State did not submit any documents as proof of this prior conviction, and therefore, it did not establish factual comparability. (CP 4-105; 12/16/14 RP 5-8); *see also Thieffault*, 160 Wn.2d at 417. Because the facts do not show that Mr. Scherbert acted with intent, the Nevada second degree murder conviction is not factually comparable to second degree murder in Washington. *See* RCW 9A.32.050(1) (1986).

Defense counsel's stipulation, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense and defense counsel's failure to object to the inclusion of the Nevada second degree murder conviction in his offender score without a comparability analysis prejudiced Mr. Scherbert.

It was equally likely that documentation obtained by the State may or may not have provided facts sufficient to find the Nevada second degree murder factually comparable to second degree murder in Washington. *See Thieffault*, 160 Wn.2d at 417. If the documentation did not provide facts sufficient to find the Nevada second degree murder factually comparable to second degree murder in Washington, it cannot serve as the predicate offense to the unlawful possession of a firearm charges. *See* RCW 9.41.040(1)(a) (defining unlawful possession of a

firearm in the first degree); RCW 9.41.010(21)(o) (defining serious offense). And, the trial court could not have included the Nevada second degree murder conviction in Mr. Scherbert's offender score. *See* RCW 9.94A.525(3). Under both of 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. Scherbert has proved the two-prong test for ineffective assistance of counsel. His trial counsel's stipulation, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense, and defense counsel's failure to object to the inclusion of the Nevada second degree murder conviction in his offender score without a comparability analysis, constituted deficient performance, and Mr. Scherbert was prejudiced thereby.

Because Mr. Scherbert was denied his right to effective assistance of counsel where defense counsel stipulated, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense, his convictions should be reversed. *See* RCW 9.41.040(1)(a); RCW 9.41.010(21)(o). In the alternative, this court should vacate Mr. Scherbert's sentence and remand the case to the trial court to conduct a factual comparability analysis of the Nevada second degree murder

conviction. *See Thieffault*, 160 Wn.2d at 417, 420 (setting forth this remedy).

Issue 2: The judgment and sentence contains four errors that should be corrected: the finding that Mr. Scherbert has the ability to pay legal financial obligations, the provision that Mr. Scherbert shall pay the costs of services to collect unpaid legal financial obligations, and the two community custody conditions.

The Judgment and Sentence includes a finding that Mr. Scherbert has the ability to pay legal financial obligations. (CP 23). However, at sentencing, the trial court made the opposite finding: it found Mr. Scherbert indigent and unable to pay court costs, and declined to impose any legal financial obligations. (CP 24-25; 12/16/14 RP 5-8).

Accordingly, this court should remand this case for correction of the judgment and sentence to remove the apparent scrivener's error that Mr. Scherbert has the ability to pay legal financial obligations.³ (CP 23); *see also, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010)

³ The State may argue it is unnecessary to remove this ability to pay finding because no legal financial obligations were ordered by the trial court. However, appellate costs may be ordered, and if so, these costs become part of the trial court judgment and sentence. *See* RCW 10.73.160(3). Therefore, it is necessary that the Judgment and Sentence accurately reflect that the trial court did not make a finding that Mr. Scherbert has the ability to pay legal financial obligations.

(remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

In addition, the Judgment and Sentence includes a provision requiring Mr. Scherbert to pay the costs of services to collect unpaid legal financial obligations. (CP 25). Because no legal financial obligations were ordered by the trial court, this provision should be stricken. (CP 25; 12/16/14 RP 5-8); *see also, e.g., Naillieux*, 158 Wn. App. at 646; *Healy*, 157 Wn. App. at 516. In addition, this provision should be stricken because the trial court found Mr. Scherbert indigent and unable to pay court costs, and therefore, unable to pay the costs of services to collect unpaid legal financial obligations. (CP 25; 12/16/14 RP 6-7).

The Judgment and Sentence also includes two community custody conditions, requiring Mr. Scherbert to consent to home visits by and comply with any conditions ordered by the Department of Corrections. (CP 29). However, the trial court did not impose a term of community custody. (CP 27-29; 12/16/14 RP 5-8). Therefore, community custody conditions are not authorized. *See* RCW 9.94A.703 (specifying conditions that shall and may be imposed “[w]hen a court sentences a person to a term of community custody. . . .”). Accordingly, this court should remand this case for correction of the judgment and sentence to remove the two

community custody conditions. (CP 29); *see also, e.g., Naillieux*, 158 Wn. App. at 646; *Healy*, 157 Wn. App. at 516.

F. CONCLUSION

Mr. Scherbert was denied his right to effective assistance of counsel where defense counsel stipulated, without a comparability analysis, that Mr. Scherbert had been convicted of a serious offense. His convictions should be reversed.

In the alternative, this court should vacate Mr. Scherbert's sentence and remand the case to the trial court to conduct a factual comparability analysis of the Nevada second degree murder conviction.

In addition, the case should be remanded for correction of the judgment and sentence to remove the finding that Mr. Scherbert has the ability to pay legal financial obligations, the provision stating Mr. Scherbert shall pay the costs of services to collect unpaid legal financial obligations, and the two community custody conditions.

Respectfully submitted this 17th day of April, 2015.



Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 32967-4-III
vs.)
ZACHARY JOHN SCHERBERT)
Defendant/Appellant)
PROOF OF SERVICE)
_____)

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 17, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Zachary Scherbert, DOC #379409
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Having obtained prior permission from the Franklin County Prosecutor's Office, I also served Shawn Sant at ssant@co.franklin.wa.us at using Division III's e-service feature.

Dated this 17th day of April, 2015.



Jill S. Reuter, Of Counsel, WSBA #38374
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com