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No. 36816-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

VICTOR JAMES MATHIS,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Victor Mathis exercised his right to testify in his own defense. The State in return charged him with perjury. At the resulting trial, the State did not prove Mr. Mathis gave false testimony about not being a convicted felon or having previously gone by an alias. Specifically, the State did not provide evidence of a felony conviction, basing its entire case on a fingerprint card from the Georgia Department of Corrections. Not only was this fingerprint card improperly admitted under the rules of evidence, it did not prove Mr. Mathis was previously convicted of a felony or had used any other name.

The sentencing hearing was similarly rife with errors, for which the court, the State, and Mr. Mathis' defense counsel were jointly responsible. The State alleged Mr. Mathis had an offender score of "nine," applying a faulty legal analysis to several Georgia convictions from nearly three decades ago. Defense counsel failed to object to the State's miscalculation of the offender score on comparability grounds. The court then adopted the State's erroneous calculation, failed to conduct a wash-out analysis, added an unsupported conviction to Mr. Mathis' criminal history, and improperly ran the sentence consecutively.

This Court should reverse the perjury conviction. In the alternative, it should remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to sustain the perjury conviction in violation of U.S. Const. amend. XIV and Const. art. I, § 3.

2. Findings of Fact 18 and 19 were not supported by substantial evidence in the record. CP 109.

3. The trial court erred in admitting Exhibit 2 as an exception to hearsay under ER 803(22).

4. The trial court erred in running the perjury sentence consecutively to the firearm sentences, instead of concurrently as required by RCW 9.94A.589(3).

5. The trial court's factual findings at sentencing were insufficient to support an offender score of "nine." CP 1-4.

6. Defense counsel was ineffective for failing to object to an unsupported conviction and the comparability of several Georgia felony convictions. U.S. Const. amend. VI; Const. art. I, § 22.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State must prove every essential element of a crime beyond a reasonable doubt. To sustain a perjury conviction, the State must present the testimony of two witnesses, or one witness coupled with independent evidence. Here, the State alleged Mr. Mathis perjured himself in his

criminal trial by testifying he was not a convicted felon and had not previously used an alias. In addition to one officer's testimony, the State submitted a fingerprint card from the Georgia Department of Corrections as proof of a prior conviction and use of alias. However, the Georgia fingerprint card was insufficient evidence of a felony conviction. Did the State fail to meet its burden to prove Mr. Mathis committed perjury?

2. Hearsay is generally inadmissible. Here, the State offered and the trial court admitted the Georgia fingerprint card as an exception to the hearsay rule, as a "judgment of a previous conviction." However, the fingerprint card was not proof of a final judgment of a felony, and thus did not fit within the confines of this rule. Was this evidence improperly admitted, warranting reversal?

3. RCW 9.94A.589(3) requires concurrent sentences when a person who is not serving a felony sentence commits a felony and, before sentencing, is sentenced for a different felony. Here, Mr. Mathis allegedly committed perjury during his trial for two counts of unlawful possession of a firearm. He was not serving a felony sentence at the time of that trial. He was later sentenced for the unlawful possession counts, followed by a conviction and sentence for the perjury count. Accordingly, his sentences should have run concurrently. Did the sentencing court err in imposing a consecutive sentence?

4. The State bears the burden of proving a defendant's offender score at sentencing, including the burden to prove prior offenses may be included in the offender score calculation. Based upon the court's findings, only three of Mr. Mathis' prior offenses could be counted in his offender score. However, the court concluded he had an offender score of "nine." Did the court err in calculating Mr. Mathis offender score?

5. At sentencing, the court may only rely on information that was admitted, acknowledged, or proved beyond a reasonable doubt. Further, prior out-of-state convictions may only be included in a defendant's offender score at sentencing if they are comparable to a Washington criminal violation. A defense attorney is ineffective at sentencing if they fail to object to unsupported or non-comparable convictions that increase a defendant's offender score. Here, the sentencing court included one felony conviction from Georgia that was not supported by the record, as well as several felony convictions from Georgia that were not comparable to Washington criminal violations. Defense counsel failed to object and Mr. Mathis stipulated to an offender score of "nine." Did Mr. Mathis receive ineffective assistance of counsel at sentencing, requiring a new sentencing hearing?

D. STATEMENT OF THE CASE

1. Mr. Mathis is charged with two firearm counts, testifies in his own defense at trial, and is convicted on all charges.

Officers responded to a disorderly call at Mr. Mathis' residence and learned that a rifle was allegedly brandished during an altercation. RP 51–52. Mr. Mathis voluntarily led the officers to where the rifle was located and turned it over to them for safekeeping. RP 52. Later, one of the officers checked Mr. Mathis' name and determined that he had a criminal history that prohibited him from having firearms. RP 52. According to the officer, Mr. Mathis was previously convicted of armed robbery and burglary in Georgia. RP 53. The officer applied for and was granted a search warrant for Mr. Mathis' residence. RP 52.

During the execution of the search warrant, Mr. Mathis received *Miranda* warnings. RP 53. Mr. Mathis then informed the officer it was his brother, not him, who was convicted of several felonies in Georgia. RP 53–54. The officer told Mr. Mathis the convictions were tied to him by certain identifying information. RP 54. The officer claimed Mr. Mathis then admitted he had been convicted of armed robbery and burglary in

Georgia. RP 54. Mr. Mathis continued to cooperate, turning over a second rifle. RP 55.

Mr. Mathis was charged with two counts of first degree unlawful possession of a firearm. *See State v. Mathis*, No. 36296-5-III, 2019 WL 3934651 at *1 (Aug. 20, 2019) (unpublished), *petition denied*, No. 97674-1, 455 P.3d 124 (Jan. 8, 2020). These charges required the State to prove the existence of a prior conviction of a “serious offense.” *See* RCW 9.41.040(1)(a); *see also* RCW 9.41.010(27) (defining a “serious offense.”) In order to establish the prior conviction element, the State introduced evidence it alleged proved Mr. Mathis had been convicted of several felonies in Georgia in 1991. *See Mathis*, 2019 WL 3934651 at *1. However, the name listed on the convictions was not Mr. Mathis’ name, but “Victor Lewis James,” which the State insisted was an alias. *See id.*

During the trial, Mr. Mathis testified in his own defense that he had a half-brother named Victor Lewis James, with whom he shared both a father and the same first name. *See id.* at *2. Mr. Mathis explained he referred to this brother as his “twin” because they were conceived around the same time, while acknowledging they were not technically twins because they did not share the same mother. *See id.*; *see also* RP 68. Mr. Mathis testified it was his brother, Mr. James, who committed and was convicted of several felonies in Georgia in 1991. RP 67–68. Mr. Mathis

further testified he had neither gone by any other name nor been convicted of a felony in Georgia. RP 64–65.

Mr. Mathis was convicted by a jury and received concurrent 102-month sentences on each count. *See Mathis*, 2019 WL 39345651 at *2.

The convictions were upheld on appeal. *See id.* at *3.

2. Mr. Mathis is charged with and convicted of perjury for the testimony he gave at his previous criminal trial, and is sentenced to 84 months consecutive to his other sentence.

As the appeal was pending, the State charged Mr. Mathis with perjury, alleging he lied under oath in his criminal trial. CP 124.

Specifically, the State alleged Mr. Mathis lied under oath in testifying he was not a convicted felon and that he had not previously used any other name. CP 124.

Mr. Mathis opted for a bench trial. CP 116; RP 5–7. The State presented several law enforcement witnesses at trial, including one who testified regarding Mr. Mathis’ alleged confession. *See* RP 29–57. Over repeated defense objections, the State introduced a fingerprint card from the Georgia Department of Corrections the State alleged contained Mr. Mathis’ fingerprints. RP 36, 41, 57, 79–81, 90–93; RP 94–95 (trial court’s order admitting the fingerprint evidence); *see also* Ex. 2 (the Georgia fingerprint card). The State offered the testimony of a fingerprint expert

that the Georgia fingerprint card matched Mr. Mathis' prints. *See* RP 82–96.

The trial court found Mr. Mathis guilty of perjury, relying on his statements to police at the time of arrest as well as the fingerprint evidence. CP 106–113. The court sentenced Mr. Mathis to a standard range sentence of 84 months, to be served consecutive to his sentence for the firearm convictions. RP 120; CP 5.

E. ARGUMENT

1. Mr. Mathis' perjury conviction should be reversed because the Georgia fingerprint card was insufficient to prove the existence of a prior felony conviction and was improperly admitted as an exception to hearsay.

The requirements of proof in a perjury case “are the strictest known to the law, outside of treason charges.” *State v. Olson*, 92 Wn.2d 134, 135, 594 P.2d 1337 (1979). In order to prove the crime of perjury, the State must present “(1) the testimony of at least one credible witness which is positive and directly contradictory of the defendant's oath; and (2) another such direct witness or independent evidence of corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence.” *Id.* (citation omitted).

In finding Mr. Mathis guilty of perjury, the trial court relied on one officer's testimony that Mr. Mathis confessed to being a convicted felon. Critically, however, the court also relied on an expert witness' testimony that Mr. Mathis' fingerprints taken in Klickitat County matched a Georgia fingerprint card from the Georgia Department of Corrections. CP 112–13; *see also* Ex. 2. The trial court concluded both sets of testimony and the fingerprint evidence were required in order to satisfy the demanding standard of proof for perjury convictions. *See* CP 110–11; *see also* *Olson*, 92 Wn.2d at 135.

Because the fingerprint card was insufficient evidence of a Georgia felony conviction, the conviction must be reversed. In the alternative, the conviction must be reversed because the fingerprint card was improperly admitted as an exception to hearsay under ER 803(22) (judgment of previous conviction).

a. The fingerprint card was insufficient evidence of a felony conviction.

“The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). “Where sufficient evidence does not support a conviction, such a conviction ‘cannot constitutionally stand.’” *State v. Hummel*, 196 Wn. App. 329, 353–54, 383 P.3d 592 (2016)

(quoting *Jackson v. Virginia*, 443 U.S. 307, 317–18, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)); *see also* U.S. Const. amend. XIV; Const. art. I, § 3. This Court may affirm the conviction only if it can conclude that a reasonable fact finder, viewing the evidence in the prosecution’s favor, could find the essential elements of the crime beyond a reasonable doubt. *See Hummel*, 196 Wn. App. at 353–24.

In order to convict Mr. Mathis of perjury in the first degree, the State was required to prove he knowingly lied under oath in his previous trial about being a convicted felon or having used an alias. *See* RCW 9A.72.020(1); CP 124 (information). The State was required to sustain its burden of proof with the testimony of two witnesses, or one witness coupled with independent evidence. *See Olson*, 92 Wn.2d at 135. The State did not meet this burden.

In its attempt to prove Mr. Mathis was a convicted felon and had gone under a different name, the State introduced a fingerprint card from the Georgia Department of Corrections labeled with the name “Victor Lewis James.” *See* Ex. 2. The State sought to admit the card as a “judgment of a previous conviction” under ER 803(22). *See* RP 79. However, as the trial court noted, the offered exhibit was “just a fingerprint page . . . I don’t know if it is a document of a judgment entered after a final trial.” RP 80; *see also* Ex. 2. After initially sustaining

repeated defense objections to its admissibility, the trial court ultimately admitted Exhibit 2 under the State’s proposed exception. RP 34, 36, 41, 81, 90, 92 (defense objections); RP 94–95 (court’s ruling on admissibility).

The court heavily relied on Exhibit 2 in finding Mr. Mathis guilty of perjury. *See* CP 106–13. In its final ruling, the court found that the investigating detective obtained “fingerprint records for the person convicted” of burglary and armed robbery in Georgia, and described Exhibit 2 as “Georgia fingerprints for Victor Lewis James for Georgia convictions of burglary and armed robbery.” CP 109 (Findings of Fact 18 and 19). The court concluded that “the fingerprints of Victor James Mathis were the same as the individual convicted in Georgia for armed robbery and burglary.” CP 113 (Conclusions of Law 11). The court further concluded this testimony corroborated the officer’s testimony that Mr. Mathis had confessed to being a convicted felon, and relied on this evidence to find Mr. Mathis guilty of perjury. CP 113 (Conclusions of Law 11–13).

However, the Georgia fingerprint card was insufficient evidence of a felony conviction. *See* Ex. 2. The document merely indicates a “Victor James Mathis” was “charge[d],” but nowhere does it indicate that any charges led to a conviction. *See* Ex. 2. As the trial court initially

acknowledged, the exhibit itself is “just a fingerprint page,” not a judgment and sentence. RP 80; *see also* Ex. 2. The exhibit indicates it is from the “Dept of Corr” in Atlanta, Georgia, is labeled with the name “Victor Lewis James” at the top, and contains identifying information, such as race, height, weight, social security number, and a set of fingerprints. *See* Ex. 2. The exhibit also includes a box labeled “CHARGE,” with the following information listed: “POSS FIREARM CONVICT FELON (91385): POSS OF CERTIAN [sic] WEAPONS (91385): POSS OF FIREARM DUR CRIME (91385): AG AGRAVATED [sic] ASSAULT (91385): ARMED ROB*.” *See* Ex. 2. Contrary to the trial court’s finding, the exhibit contains no information regarding a burglary conviction *See* Ex. 2. The exhibit also includes box labeled “FINAL DISPOSITION,” followed by a string of numbers and letters. *See* Ex. 2. However, nowhere in the document does it state it is a judgment and sentence, or verify that the individual fingerprinted was actually convicted of any charges. *See* Ex. 2. The exhibit, with the fingerprints partially redacted, is reproduced on the following page:

LEAVE BLANK		TYPE OR PRINT ALL INFORMATION IN BLACK		LEAVE BLANK	
677-2591		LAST NAME <u>NAM</u> FIRST NAME <u>VICTOR</u> MIDDLE NAME <u>LEES</u>			
STATE USAGE ADDITIONAL SENTENCE		ALIASES		CONTRIBUTOR	
SIGNATURE OF PERSON FINGERPRINTED <i>Victor Nam</i>				GA060025C DEPT OF CORR ATLANTA, GA	
THIS DATA MAY BE COMPUTERIZED IN LOCAL, STATE AND NATIONAL FILES		DATE ARRESTED OR RECEIVED <u>DOA</u> 4/17/91		DATE OF BIRTH <u>DOB</u> Month Day Year 7/7/67	
DATE <u>12-5-91</u> SIGNATURE OF OFFICIAL TAKING FINGERPRINTS <i>[Signature]</i>		YOUR NO. <u>DEA</u> EF-272539		PLACE OF BIRTH <u>POB</u> DOUGLASSVILLE, GA	
CHARGE <u>POSS FIREARM CONVCT FELON(91385):POSS OF CERTIAN WEAPONS(91385):POSS OF FIREARM DUR CRIME(91385):AGGRAVATED ASSAULT(91385):ARMED ROB</u>		REF NO. <u>FBI</u> <u>UNKNOWN</u>		LEAVE BLANK	
FINAL DISPOSITION <u>5Y CT 10 CC:5Y CT 9 CC:5Y CT 8 CC:10Y 2 CTS CC:20Y SV 15Y B/P CT 1</u>		SOCIAL SECURITY NO. <u>SSC</u>		CLASS.	
CAUTION <input type="checkbox"/>				REF.	
				NCIC CLASS - FPC	

Contrary to the trial court’s findings and conclusions, Exhibit 2 does not establish a record of conviction for anyone, let alone Mr. Mathis. See CP 109, 113. Further, besides the officer’s testimony that Mr. Mathis allegedly confessed, the Georgia fingerprint card was the *only* evidence offered by the State of a prior conviction or alias. Because it did not prove Mr. Mathis was a convicted felon or had used an alias, no reasonable factfinder could find that the State met its heightened burden of proof for perjury beyond a reasonable doubt. See *Hummel*, 196 Wn. App. at 353–54; *Olson*, 92 Wn.2d at 135. The perjury conviction was not supported by sufficient evidence, and thus cannot constitutionally stand. See *Hummel*, 196 Wn. App. at 353–54. Accordingly, this Court must reverse.

b. The fingerprint card was improperly admitted as an exception to the hearsay rule.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). A statement can include nonverbal

conduct if intended to be an assertion. ER 801(a). This Court reviews whether a statement was hearsay *de novo*. *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 689, 370 P.3d 989 (2016). This is because trial courts do not have discretion to admit inadmissible evidence. *See id.* If a trial court admits inadmissible hearsay evidence, this Court must reverse a conviction if “the outcome of the trial would have been materially affected had the error not occurred.” *Id.* (quoting *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (internal quotation marks omitted)).

Here, the fingerprint card from the “Dept of Corr, Atlanta, Ga,” contained a box labeled “Signature of Person Fingerprinted” as well as a box labeled “Signature of Official Taking Fingerprints,” with both boxes signed. *See Ex. 2*. The card also listed the name “Victor Lewis James” at the top and included a full set of fingerprints. *See Ex. 2*. The exhibit was hearsay because it was offered to prove the Georgia Department of Corrections took the fingerprints of a “Victor Lewis James”—the truth of the matter asserted by the exhibit. *See Ex. 2*. That this exhibit was hearsay undisputed by the parties at trial. *See RP 91–92*.

The State offered and the trial court admitted the fingerprint card as an exception to the hearsay rule, as a “judgment of a previous conviction.” *See ER 803(a)(22); RP 79, 94–95*. Under this exception, the out-of-court statement must be:

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgment against persons other than the accused.

ER 803(a)(22). The fingerprint card did not fit within the confines of this exception. As previously explained, the fingerprint card was not proof of a final judgment of a felony, as it does not verify that the individual fingerprinted was convicted of any felony charges. For this reason alone, the fingerprint card was not admissible as a “judgment of previous conviction.” *See* ER 803(a)(22).

Even assuming for the sake of argument that the fingerprint card was evidence of a judgment of a previous criminal conviction, the exhibit does not contain any information regarding whether a trial was held or a plea entered, and thus does not fit within the confines of the exception. ER 803(a)(22). Further, the fingerprints themselves did not “prove any fact essential to sustain” a prior felony conviction. ER 803(a)(22). In sum, the exhibit does not meet the requirements of the hearsay exception under ER 803(a)(22) several times over.

Because the trial court relied on the fingerprint evidence to sustain the perjury conviction, its admission cannot be held harmless. *Compare Gonzalez-Gonzalez*, 193 Wn. App. at 690–91. Accordingly, this Court

should reverse the conviction for the independent reason that Exhibit 2 was improperly admitted hearsay evidence.

2. Resentencing is required because the court set Mr. Mathis' sentences to run consecutively, instead of concurrently as required by the Sentencing Reform Act.

A trial court may only impose a statutorily authorized sentence; “[i]f the statutory provisions are not followed, the action of the court is *void*.” *State v. Phelps*, 113 Wn. App. 347, 354–55, 57 P.3d 624 (2002) (emphasis in the original). “[W]henver a person is sentenced for a felony that was committed while the person was *not under sentence* for conviction of a felony, the sentence *shall run concurrently* with any felony sentence which has been imposed . . . subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence *expressly orders* that they be served consecutively.” RCW 9.94A.589(3) (emphasis added). This statute “applies when (1) a person who is ‘not under sentence of a felony’ (2) commits a felony and (3) before sentencing (4) is sentenced for a different felony.” *State v. Shilling*, 77 Wn. App. 166, 175, 889 P.2d 948 (1995). Under these circumstances, “a sentencing court has total discretion in deciding whether a current sentence will run concurrently with, or consecutively to, a felony sentence previously imposed.” *State v. Klump*, 80 Wn. App. 391, 396, 909 P.2d 317 (1996); *Shilling*, 77 Wn. App. at 175–76.

Here, Mr. Mathis allegedly committed the felony of perjury during his trial for two counts of unlawful possession of a firearm. *See* CP 124 (Information). He was not serving a felony sentence at the time of that trial. *See* CP 49 (state’s sentencing memo allegedly detailing Mr. Mathis’ recent criminal history). Mr. Mathis was then sentenced for the unlawful possession of a firearm convictions on August 31, 2018, receiving concurrent 102-month sentences. *See State v. Mathis*, #18-1-00017-20, Dkt. at 104; *Mathis*, 2019 WL 3934651 at *2. He was later convicted and sentenced to 84 months for the crime of perjury. *See* CP 27–37 (original judgment and sentence dated May 20, 2019). Consequently, RCW 9.94A.589(3) applied and created a presumption that the perjury sentence would run concurrently with the firearm sentences, not consecutively. *See Shilling*, 77 Wn. App. at 175.

At sentencing, Mr. Mathis asked that his perjury sentence run concurrently with the firearm sentences. RP 117. The prosecutor incorrectly characterized this request as “an exceptional sentence,” and argued there were “not substantial and compelling reasons” to grant the request. RP 119; *see also* RCW 9.94A.535(1) (listing the criteria for a mitigated sentence). Following the prosecutor's misstatement of the law, the sentencing court concluded, “I do not find that there are compelling reasons to go ahead and grant an exceptional sentence downward based

upon the nature of this offense, the criminal history in this case, and Mr. Mathis' criminal history." RP 121. Accordingly, the sentencing court set Mr. Mathis' perjury sentence to run consecutive to the firearm sentences. RP 121; CP 5.

The sentencing court certainly had the *discretion* to order a consecutive sentence. *See* RCW 9.94A.589(3). However, the transcript of the sentencing hearing makes clear that the sentencing court presumed it was *required* to run the sentences consecutively unless it found "substantial and compelling reasons" for an exceptional sentence downwards under RCW 9.94A.535(1). Because it did not find substantial and compelling reasons for an exceptional sentence downwards, the sentencing court wrongly assumed it was required to impose a consecutive sentence. *See* RP 121. This was a mistake of law that warrants reversal for a new sentencing hearing. *See State v. Anderson*, 92 Wn. App. 54, 62, 960 P.2d 975 (1998) (sentencing court's "misapplication of the law" warrants reversal).

3. Resentencing is also required because Mr. Mathis' offender score was incorrectly calculated.

"[I]n general a defendant cannot waive a challenge to a miscalculated offender score." *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). This is because "a defendant cannot agree to punishment

in excess of that which the Legislature has established.” *Id.* at 873–74. However, “[w]hile waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” *Id.* at 874 (emphasis in the original).

In *Goodwin*, the Washington Supreme Court held that stipulating to an offender score does not waive the right to appeal the score calculation if it erroneously includes convictions that should have “washed out” as a matter of law. *See Goodwin*, 146 Wn.2d at 875–76. The Court recognized that including washed out convictions in an offender score constituted legal error, and thus stipulation could not waive an appellate challenge. *See id.* at 874. In contrast, this Court has held that a stipulation that a foreign conviction is comparable involves a factual determination and waives any appellate challenge. *See State v. Hickman*, 116 Wn. App. 902, 907, 68 P.3d 1156 (2003).

However, for a stipulation to bar an appellate challenge, there must be “an *affirmative* acknowledgment by the defendant of the *facts and information* introduced for the purposes of sentencing” before the State is relieved of its burden to of proving criminal history. *See State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009), *disapproved of on*

other grounds by State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014) (emphasis in the original). Further, even if a defendant stipulates to an offender score that was incorrectly calculated on the basis of a factual determination or a discretionary decision, the defendant may still challenge the calculation on appeal if they received ineffective assistance of counsel. *See State v. Hernandez*, 172 Wn. App. 537, 545, 290 P.3d 1052 (2012). In order to prevail on the grounds of ineffective assistance, an appellant must show that counsel’s performance was both deficient and prejudicial. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

Here, the State alleged Mr. Mathis had an offender score of nine, relying on seven Georgia felony convictions from 1990 and 1991, as well as two Washington felony convictions for unlawful possession of a firearm from 2018. CP 49–50. At sentencing, the sentencing court asked Mr. Mathis’ defense counsel if she agreed with the State’s calculation of an offender score of “nine.” RP 118. She answered in the affirmative. RP 118. The sentencing court next asked Mr. Mathis, “do you also stipulate and agree that your offender score is nine in this matter?” RP 118. Mr. Mathis responded, “Yes.” RP 118. Without conducting a comparability analysis or an analysis of whether any of the felonies

“washed out,” the court imposed a standard range sentence based on an offender score of nine. CP 3, 5.

It is doubtful this stipulation could be considered an “*affirmative acknowledgment*” by Mr. Mathis of “*facts and information* introduced for the purposes of sentencing,” and thus a waiver of any factual or discretionary appellate challenges to the offender score. *See Mendoza*, 165 Wn.2d at 928. Regardless, Mr. Mathis challenges his offender score on the basis of legal error and ineffective assistance of counsel, issues that cannot be waived by stipulation. *See Goodwin*, 146 Wn.2d at 874; *Hernandez*, 172 Wn. App. at 545. The sentencing court failed to conduct a “wash out” analysis, thus the trial court’s criminal history findings—which consist almost entirely of convictions nearly three decades old—cannot support an offender score of “nine” as a matter of law. Further, the court erroneously added a conviction that was neither supported by the record nor alleged by the State, and several of the felonies that counted towards Mr. Mathis’ offender score were not comparable under Washington law. Mr. Mathis’ defense counsel was ineffective for failing to object to the offender score on these grounds. Accordingly, this Court should remand for resentencing.

- a. The trial court did not find that any felony convictions “washed out,” and so this Court must presume that the 1990 and 1991 Georgia felony convictions do not count towards Mr. Mathis’ offender score.

Class B and C felonies, other than sex offenses, may only be included in the offender score if the state proves the defendant has not spent enough time in the community crime-free. RCW 9.94A.525(2)(b), (c). A Class B felony may not be included if the person has spent ten years in the community crime-free. *Id.* at (2)(b). For a Class C felony, the “wash out” is only five years. *Id.* at (2)(c). These “washed out” felonies “shall not be included in the offender score.” *See id.* at (2)(b), (c) (emphasis added).

The State bears the burden of proving a defendant’s offender score at sentencing by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999). This includes the burden to prove an offense has not washed out. *See State v. Cross*, 156 Wn. App. 568, 587, 234 P.3d 288 (2010). “In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (citations omitted). Here, the sentencing court made factual findings, including criminal history, as part

of the judgment and sentence. *See* CP 1 (“II. Findings”); CP 3 (criminal history findings). Below are the trial court’s criminal history findings:

2.2 Criminal History (RCW 9.94A.525):

	<i>Crime</i>	<i>Date of Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>	<i>DV* Yes</i>
1	BURGLARY	9/19/89	2/23/90	DOUGLAS, GA	A	FB	
2	ARMED ROBBERY	12-7-90	4/17/91	DOUGLAS, GA	A	FA	
3	AGGRAVATED ASSAULT	12-7-90	4/17/91	DOUGLAS, GA	A	FB	
4	AGGRAVATED ASSAULT	12-7-90	4/17/91	DOUGLAS, GA	A	FB	
5	AGGRAVATED ASSAULT	12-7-90	4/17/91	DOUGLAS, GA	A	FB	
6	UNLAWFUL POSSESSION OF A FIREARM	12-7-90	4/17/91	DOUGLAS, GA	A	FB	
7	UNLAWFUL POSSESSION OF A FIREARM	12-7-90	4/17/91	DOUGLAS, GA	A	FC	
8	POSSESSION OF A FIREARM BY A CONVICTED FELON	12-7-90	4/17/91	DOUGLAS, GA	A	FC	
9	UNLAWFUL POSSESSION OF A FIREARM 1 ST DEGREE	1/31/18	8/31/2018	KLICKITAT, WA	A	FB	
10	UNLAWFUL POSSESSION OF A FIREARM 1 ST DEGREE	1/31/18	8/31/2018	KLICKITAT, WA	A	FB	

See CP 3. Based on these findings, the court determined Mr. Mathis had an offender score of “nine” and a standard range of 72 to 96 months. CP 3. The trial court did not find Mr. Mathis had any offenses between his 1991 and 2018 offenses. CP 1–10 (amended judgment and sentence); *see also* RP 118–21. Absent the finding Mr. Mathis had any offenses in that 28 year period, this Court must assume the State failed to carry its burden that the State failed to carry its burden that Mr. Mathis had any intervening offenses. *See Armenta*, 134 Wn.2d at 14.

Besides the 2018 convictions, all the felonies listed in Mr. Mathis' criminal history date back to 1990 and 1991, approximately 30 years ago. *See* CP 3. Because more than ten years have passed, none may be included in the offender score calculation. RCW 9.94A.525(2)(b), (c). The only exception is the armed robbery conviction, which the State alleged was comparable as a Class A felony.¹ *See* CP 44–45 (State's sentencing memo).

The court's actual findings only establish an offender score of, at most a "three."² *See* CP 3; *see also* RCW 9.94A.525(2)(a). With an offender score of "three," Mr. Mathis' standard range should have been 15 to 20 months. *See* Washington State Adult Sentencing Guidelines 405 (2018).

When the sentencing court's findings do not support the offender score, the proper remedy is remand for resentencing, not remand to supplement the findings of fact. *State v. Ramirez*, 190 Wn. App. 731, 734–35, 359 P.3d 929 (2015). Accordingly, in the event this Court does not reverse the perjury conviction, it should remand for a resentencing on these grounds.

¹ As explained below, the armed robbery conviction is not comparable to a Washington offense and thus cannot be counted in Mr. Mathis' offender score.

² Assuming for sake of argument the 1991 armed robbery conviction qualifies as a Class A felony and thus does not wash. *See* n.1.

b. Only one Georgia conviction for “unlawful possession of a firearm” was supported by the record and alleged by the State, and thus defense counsel was ineffective in failing to object to the sentencing court’s inclusion of two Georgia convictions for “unlawful possession of a firearm” in Mr. Mathis’ criminal history.

“In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2). Here, the prosecutor alleged one Georgia conviction for unlawful possession of a firearm should count towards Mr. Mathis’ offender score. CP 46. The prosecutor relied on a Georgia indictment and guilty plea that only included one count of unlawful possession of a firearm. CP 55–63. For reasons that are unclear from the record,³ the sentencing court listed two Georgia convictions for unlawful possession of a firearm in Mr. Mathis’ criminal history. CP 3. The additional count was not admitted, acknowledged, or proved by any evidence, and thus should not be included in Mr. Mathis’ offender score. *See* RCW 9.94A.530(2).

Despite stipulating to their offender score at sentencing, a defendant does not waive the issue of an incorrectly calculated offender

³ It could be the court was relying on the prosecutor’s representation in his sentencing memo that there were two Georgia convictions for unlawful possession of a firearm; however, the memo later corrected itself, arguing only one conviction was supported by documentation. *Compare* CP 43 *with* 46.

score on appeal if they received ineffective assistance of counsel. *See Hernandez*, 172 Wn. App. at 545; *see also State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). In order to prevail on an ineffective assistance of counsel claim, Mr. Mathis must show both that his defense counsel was deficient, *i.e.*, that her representation “fell below an objective standard of reasonableness based on consideration of all the circumstances,” and (2) that counsel’s deficiency prejudiced Mr. Mathis’ case, *i.e.*, “there is a reasonable possibility that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *McFarland*, 127 Wn.2d at 334–35. Because Mr. Mathis’ defense attorney did not object to this additional count, she was ineffective and her deficiency was prejudicial. *See State v. Davis*, 3 Wn. App. 2d 763, 783, 418 P.3d 199 (2018). Accordingly, this Court should remand for resentencing.

c. Several of the Georgia convictions are not comparable to Washington offenses, and thus Mr. Mathis’ defense attorney was ineffective in failing to object to an offender score of “nine.”

Prior out-of-state convictions may be included in a defendant’s offender score at sentencing if they are comparable to a Washington criminal violation. *See RCW 9.94A.525(3)*. The State bears the burden of proof of demonstrating comparability. *Ford*, 137 Wn.2d at 480.

To determine comparability, Washington courts apply a two-part test: First, a court compares the elements of the out-of-state conviction to its Washington counterpart. *State v. Olsen*, 180 Wn.2d 468, 472–73, 325 P.3d 187 (2014). “[T]he sentencing court must first look to the elements of the crime,” and then compare those elements to “to a Washington criminal statute in effect when the foreign crime was committed.” *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). “If the foreign conviction is identical to, or narrower than, the Washington statute, the foreign conviction counts towards the offender score as if it were the Washington offense.” *Olsen*, 180 Wn.2d at 478. If the statutes are not legally comparable, courts “move on to the factual prong, under which [courts] determine whether the defendant’s conduct would have violated the comparable Washington statute.” *Id.*

However, in conducting a factual comparability analysis, sentencing courts may only consider those facts that were “admitted, stipulated to, or proved beyond a reasonable doubt.” *Olsen*, 180 Wn.2d at 473–74 (citations omitted). This limitation is necessary to protect a defendant’s right to due process. *See State v. Thomas*, 135 Wn. App. 474, 476, 144 P.3 1178 (2006). This includes only those facts that were “clearly charged and then *clearly proved beyond a reasonable doubt* to a jury or admitted by the defendant.” *Olsen*, 180 Wn.2d at 476 (emphasis

added). In line with this requirement, facts included in charging documents alone are not sufficient to establish factual comparability, even if the defendant pled guilty as charged. *Thomas*, 135 Wn. App. at 486–87; *see also State v. Bunting*, 115 Wn. App. 135, 141–42, 61 P.3d 375 (2003) (a guilty plea is not an admission of the facts in the charging document).

Here, Mr. Mathis’ counsel agreed that his offender score was correctly calculated as a “nine.” RP 118. Mr. Mathis also agreed and stipulated to the scoring. RP 118. However, the State failed to meet its burden in proving that several felonies were legally or factually comparable to a Washington crimes. Further compounding its failure to meet its burden, the State presented the wrong legal analysis in its sentencing memo, apparently relying on current Washington and Georgia statutes as opposed to those in effect during the relevant time period, *i.e.*, 1990 and 1991. *See* CP 42–47; *see also Lavery*, 154 Wn.2d at 255. This Court should conclude that Mr. Mathis received a higher sentence than he would have had his defense attorney not been deficient in her representation.

1. Comparability of the burglary conviction.

The sentencing court counted a 1990 Georgia burglary conviction in Mr. Mathis’ offender score. *See* CP 3. Under the Georgia burglary statute in place in 1990, a person committed the offense of burglary when:

without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another **or any building, vehicle, railroad car, watercraft**, or other such structure designed for use as the dwelling of another or enters or remains within any other **building, railroad car, aircraft**, or any room or any part thereof.

Ga. L. 1980, p. 770, § 1 (emphasis added); *see also* O.C.G.A. § 16-7-1 (1990). The prosecutor relied on Washington’s residential burglary statute to assert the burglary conviction was comparable. CP 47 (citing RCW 9A.52.025). However, the residential burglary statute in place in 1990 stated that “[a] person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a **dwelling other than a vehicle.**” *See* Laws of 1989, 2d Ex. Sess., ch. 1 § 1 (emphasis added). The Georgia statute is broader, including burglary of vehicles, railroad cars, watercraft, and aircraft. *See* O.C.G.A. § 16-7-1 (1990). Accordingly, the Georgia burglary statute is not legally comparable. *See also State v. McCorkle*, 88 Wn. App. 485, 496, 945 P.2d 736 (1997) (recognizing that “Georgia’s burglary statute is broad in scope, encompassing three potentially comparable Washington felonies,” including burglary in the second degree, residential burglary, and vehicle prowl).

This Court must next consider if there is any factual comparability to the Washington residential burglary statute based on facts that were

admitted, stipulated to, or proved beyond a reasonable doubt. *See Olsen*, 180 Wn.2d at 478. In its sentencing memo, the State alleged the burglary conviction was factually comparable based on information in the charging documents. *See* CP 47. The burglary charging document alleged a “Victor Lewis James” “did unlawfully, without authority and with intent to commit theft therein enter the dwelling house of another to wit: Mable Baldwin and Ross R. James, located at 8200 Colquitt Street, Douglasville, Ga.” CP 76. However, the “final disposition” submitted as evidence by the State only indicates that a “Victor Lewis James” pled guilty to burglary, and thus the State’s proffered facts were not proven beyond a reasonable doubt, nor admitted or stipulated to. *See* CP 77. Accordingly, the facts alleged in the charging document cannot be relied upon to determine comparability. *See Thomas*, 135 Wn. App. at 486–87.

The 1990 burglary conviction was not legally or factually comparable and should not have counted towards Mr. Mathis’ offender score.

2. *Comparability of the armed robbery conviction.*

The sentencing court counted a 1991 armed robbery conviction in Mr. Mathis’ offender score. *See* CP 3. Under the Georgia armed robbery statute in place in 1991:

A person commits the offense of armed robbery when, with intent to commit theft, he takes the property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon.

Ga. L. 1985, p. 1036, § 1; O.C.G.A. § 16-8-41 (1991). Georgia law

further defined the offense of robbery to include three alternative means:

“(1) By use of force; (2) By intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to

himself or to another; or (3) **by sudden snatching.**” Ga. L. 1984, p. 900,

§ 4 (emphasis added); *see also* O.C.G.A. § 16-8-40 (1991). In its

sentencing memo, the prosecutor alleged the armed robbery conviction

was comparable to first degree robbery in Washington. CP 44–45. Under

the Washington first degree robbery statute in place in 1991, a person was

guilty of first degree robbery if:

in the commission of a robbery or of immediate flight therefrom, he: (a) Is armed with a deadly weapon; or (b) Displays what appears to be a firearm or other deadly weapon; or (c) Inflicts bodily injury.

Laws of 1975, 1st Ex. Sess, ch. 260(a) § 9A.56.200. Washington law

further defined robbery at the time as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.

Laws of 1975, 1st Ex. Sess, ch. 260(a) § 9A.56.190. As this Court recognized in *State v. Bruno*, the Georgia robbery statute and the Washington robbery statute are not comparable because “Georgia’s robbery statute includes a ‘sudden snatching’ alternative means that is not included in the Washington robbery statute, and is therefore broader.” *State v. Bruno*, 2017 WL 5127781 at *2, 1 Wn. App. 2d 1010 (2017) (unpublished).⁴ Accordingly, the statutes are not legally comparable. Further, the prosecutor did not allege the statutes were factually comparable. *See* CP 44–45. Based on the record, the armed robbery conviction is not factually comparable, as the only considerable factual evidence is a guilty plea to armed robbery. *See* CP 63; *see also Thomas*, 135 Wn. App. at 486–87.

The 1991 armed robbery conviction was not legally or factually comparable and should not have counted towards Mr. Mathis’ offender score.

3. Comparability of the unlawful possession of a firearms conviction.

The sentencing court included two⁵ 1991 Georgia convictions for “unlawful possession of a firearm” in Mr. Mathis’ offender score. CP 3.

⁴ Mr. Mathis cites *Bruno* pursuant to GR 14.1.

⁵ As previously noted, only one of these was convictions was alleged by the prosecutor or supported by the charging documents submitted with the State’s sentencing memo.

Under the allegedly comparable Georgia statute in place in 1991, “[a] person commits the offense of an unlawful possession of firearms or weapons when he knowingly has in his or her possession any **sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon, or silencer.**” Ga. L. 1968, p. 983, § 3 (emphasis added); *see also* O.C.G.A. § 16-11-123 (1991). However, under the allegedly comparable Washington laws in place in 1991, it was only unlawful to “manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control **any machine gun**, or any part thereof capable of use or assembling or repairing any machine gun.” Laws of 1982, 1st Ex. Sess., ch . 47 § 2; *see also* CP 46 (alleging comparability to “Unlawful Possession of a Firearm” under RCW 9.41.190). Because the Georgia statute includes shotguns, rifles, other dangerous weapons, and silencers, it is broader, and the statutes are not legally comparable.

Again, the State relied on the charging document to argue factual comparability, but these facts were not proven beyond a reasonable doubt, nor admitted or stipulated to. *Thomas*, 135 Wn. App. at 486–87. Even if they were, the charging documents relied on by the State alleges possession of a sawed-off shotgun, which was not prohibited under the comparable statute in 1991. *See* Laws of 1982, 1st Ex. Sess. ch. 47 § 2. Accordingly, the 1991 Georgia convictions for unlawful possession of a

firearm were not legally nor factually comparable and should not have counted towards Mr. Mathis' offender score.

4. Comparability of the conviction for possession of firearms by convicted felons.

The sentencing court included a 1991 Georgia conviction for possession of a firearm by a convicted felon in Mr. Mathis' criminal history. CP 3. Under the Georgia law in place in 1991:

Any person who is on probation as a first offender pursuant to Article 3 of Chapter 8 of Title 42 or **who has been convicted of a felony** by a court of this state or any other state; by a court of the United States including its territories, possessions, and dominions; or by a court of any foreign nation and who receives, possesses, or transports **any firearm** commits a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years.

Ga. L. 1989, p. 14, § 16; O.C.G.A. § 16-11-131(b) (1991). The allegedly comparable Washington law in place in 1991 reads as follows:

A person is guilty of the crime of unlawful possession of a short firearm or pistol, if, having previously been convicted in this state or elsewhere **of a crime of violence or of a felony** in which a firearm was used or displayed, the person owns or has in his possession any **short firearm or pistol**.

Laws of 1983, ch. 232, § 2; *see also* CP 46–47 (alleging comparability to “Unlawful Possession of a Firearm in the Second Degree” under RCW 9.41.014(2)⁶). The statutes are not legally comparable as Georgia

⁶ This appears to be a typo. Unlawful possession of a firearm in the second degree is criminalized under RCW 9.41.140(2).

prohibits possession of “any firearm,” whereas the Washington statute prohibits the narrower category of “short firearm[s] or pistol[s].”

The State argued the statutes were factually comparable, pointing to allegations in the charging document “that the defendant ‘having been convicted by a Court of competent jurisdiction of the offense of Burglary, a felony under the laws of this state, did receive and possess a firearm, to wit: a .410 shotgun.’” *See* CP 46–47; *see also* CP 60 (Georgia charging documents). Again, the charging documents were insufficient for a factual comparability analysis. *Thomas*, 135 Wn. App. at 486–87. Further, even if the charging documents were sufficient, a .410 shotgun is neither a “short firearm” nor a “pistol,” and thus the crimes are not factually comparable. *See* Laws of 1983, ch. 232, § 1 (defining a “short firearm” and “pistol” to mean “any firearm with a barrel less than twelve inches in length”). Additionally, the Washington laws in place in 1991 required a predicate “crime of violence,” which was defined to include “burglary in the second degree,” but not residential burglary, the crime the State argued was comparable to the Georgia burglary statute. *See* Laws of 1983, ch. 232, § 1; *see* CP 46–47 (State’s sentencing memo).

The 1991 conviction for possession of firearms by convicted felons was not legally or factually comparable, and thus should not have been included in Mr. Mathis’ offender score.

4. *Defense attorney's failure to object to the noncomparable felonies was both deficient representation and prejudicial.*

Mr. Mathis' defense attorney's failure to object to the improper comparability analysis is per se ineffective assistance of counsel. *See Thieffault*, 160 Wn.2d at 417. "Prejudice is self-evident [if] it increases the defendant's offender score." *Davis*, 3 Wn. App. 2d at 783. Had the defense attorney objected on comparability grounds, the convictions for burglary, armed robbery, unlawful possession of a firearm, and possession of a firearm by a convicted felon would have been excluded from Mr. Mathis' criminal history and his offender scoring. Accordingly, this Court should reverse and remand for a new sentencing hearing.

F. CONCLUSION

For the reasons stated above, this Court should reverse the perjury conviction. In the alternative, this Court should remand for a new sentencing hearing.

DATED this 31 day of January, 2020.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 36816-5-III
v.)	
)	
VICTOR MATHIS,)	
)	
APPELLANT.)	

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