SUPREME COURT NO. 100297-1

NO. 37131-0-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

FREDDY MUNOZ RAZO

Petitioner.

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

# PETITION FOR REVIEW

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# APPENDIX (A)

A. IDENTITY OF PETITIONER

Comes now the petitioner, Freddy Munoz Razo, appearing pro se and an inmate at the Washington State Penitentiary who seeks the relief in part B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.5, petitioner seeks review of the order of the Court of Appeals Division III, entered on July 13, of 2021 and filed on September 21, of 2021 that denied Motion for Reconsideration from statement of additional grounds. A copy of the court's decision is attached hereto as appendix (A).

C. ISSUES PRESENTED FOR REVIEW

1. Where the trial court denied Mr.Razo's Constitutional right to confront witnesses against him, should review be granted under RAP 13.4(b)(1),and (b)(3)?

2. Where the trial court denied Mr.Razo's Constitutional right of due process by allowing a erroneous Jury instruction which relieved the State of proving every element of the crime beyond a reasonable doubt, should review be granted under RAP 13.4(b)(1), (b)(2),and (b)(3)?

D. STATEMENT OF THE CASE

1. Here in Mr.Razo's case there is no question Brandon Honeycutt's suffered from severe diagnosed schizophrenia. See RP 18-21, RP 384-85 "Ever since he's been arrested he was diagnosed as schizophrenic". RP 384-85, RP 18-21. They put him on Zoloft and on antipsychotic medication.

Although he can be slow in responding now he's intelligible, you can understand him. RP 384-85. "A lot of what is going on in the interviews like Detective Duggan you know restating something for him. He'll shrug or nod his head or make an affirmative. Detective Duggan can't testify for him, and can't do that here in the court room. He can't be led by the State here in the court room. That makes his testimony that's recorded almost impossible to understand". RP 18-21.

Clearly Brandon Honeycutt suffered from severe diagnosed schizophrenia during his interviews that gradually got better with medication. He was not on medication prior to being arrested. RP 384-85.

Mr.Razo was not allowed to confront his witness on these issues.

2. This was not harmless error, Amy McGee testified that she was bent forward with the men behind her in a

semi-circle. RP 309-310. Amy McGee testified the gun was "given" to Mr.Razo and he refused to shoot her. RP 310. Amy McGee testified Daniel Perez said "Fuck This", and took the gun away from Mr.Razo and shot her. RP 310.

These facts would clearly demonstrate to the Jury that Mr.Razo did not have the intent to commit premeditated first degree murder, as he clearly refused to shoot her.

Brandon Honeycutt testified he was told to take the gun and shoot Amy McGee when they were all in the car together. RP 411. He said he refused. RP 411. Brandon Honeycutt testified he stayed in the car and the other two men took Amy McGee out of the vehicle and told her to put a towel over her head and to lay down on a dike by the freeway. RP 424. In Court Brandon Honeycutt identified Mr.Razo as one of the men that was with them. RP 418. (When Det. Duggan presented a photo montage to Brandon Honeycutt on September 24,2016 he did not identify Mr.Razo). RP 259. Brandon Honeycutt testified that Mr.Razo shot Amy McGee. RP 425. Clearly without Brandon Honeycutt's testimony the State could not prove that Mr.Razo acted as the principle or an accomplice with the premeditated "Intent" to cause the "death" of Amy McGee.

See appendix (B) in support of Statement of the Case.

E. ARGUMENT SUPPORTING PETITION FOR REVIEW

1. THE TRIAL COURT DENIED MR.RAZO'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM.

The trial court erred in not allowing Mr.Razo to confront the mental state or condition and the surrounding events leading to Brandon Honeycutts testimony. It destroyed Mr.Razo's tactical strategy by not allowing him to confront his witness on these issues, and the questions and answers that would have followed. Mr.Razo was denied his Constitutional right to confrontation. See State v. Jones, 168 Wash.2d 713,720-21,230 P.3d 576 (2010); United States v. Lindstrom, 698 F.2d 1154 U.S. App. (1983).

Detective Duggan testified when he interviewed Brandon Honeycutt that he, a heavy, heavy speech impediment making it difficult to understand what he was saying. RP 243. This shows that clearly at the time of the incident Brandon Honeycutt suffered from severe schizophrenia, which would make it virtually impossible to distinguish fact from fantasy. Compounding this was Detective Duggan leading him in his interviews while he was also suffering from severe schizophrenia.

The Court agreed with Mr.Razo that the trial court should not have excluded the testimony based on the questioning involving a subject beyond subjects explored by the State during its questioning as Mr.Razo not the

State called Brandon Honeycutt to testify.

The Courts reliance on State v. Froehilich, 96 Wn.2d 301,306-07, 635 P.2d 127 (1981); for the courts rejection of Mr.Razo's argument however is misplaced.

In State v. Froehilich, 96 Wn.2d 301 the court clearly stated that "cross-examination as to a mental state or condition" to impeach a witness, is permissible. Annot, cross-examination of witness as to his mental state or condition to impeach competency, 44 A.L.R. 3d 1203,1210 (1972) and cases cited therein. Cross-examination is one of several recognized means of attempting to demonstrate that a witness has erred because of his mental state or condition.

In addition, in a proper case, counsel may produce experimental evidence to indicate a mental infirmity or he may call an expert witness to testify as to the witness mental infirmity, Annot., 44 A.L.R. 3d at 1208. In each of these methods the purpose is the same i.e., to impeach the witness and put his credibility in, issue by showing his mental condition and how it effects his testimony. See Juviler Psychicitric Opinions as to Credibility of Witnesses: A Suggested Approach, 48 Cal.L. Rev. 648,651-52 (1960) there after Juviler.

In State v. Arreondo, 188 Wn.2d 244,399 P.3d 348 (2017), The Washington Supreme Court further clarified Froehilich, 96 Wn.2d 301 by stating: In United States v. Love, the 8th Circuit of Appeals held that a trial court should apply the following factors to asses whether past mental health issues are permissible on cross-examination: "1) The nature of the psychological problems; 2) Whether the witness suffered from the condition at the time of the events to which the witness will testify; and 3) the temporal recency or remoteness of the condition." 329 F.3d 981,984 (8th Cir.2003)(citing Boggs v. Collins, 226 F.3d 728,742 (6th Cir.2000): See United States v. Robinson, 583 F.3d 1265,1274-75 (10th Cir.2009)(trial courts failure to engage in such searching analysis prior to barring cross-examination was not harmless error): See also United States v. Sasso, 59 F.3d 341,347-48 (2d Cir. 1995)(trial courts searching analysis was sufficient to bar cross-examination implicating mental health issues).

These factors provide trial courts an effective means to consider the relevancy, probative value, and prejudicial effect from the disclosure of a witness's mental health limitations.

We adopt these factors...State v. Arreondo, 188 ..."The Court of Appeals, in affirming the trial court's

ruling barring cross-examinations into Simon's mental health, contrasted the actions of the trial court with those of the trial courts in State v. Peterson, 2 Wn.App. 464,466,469 P.2d 980 (1970), and State v. Froehilich, 96 Wn.2d 301,306,365 P.2d 127 (1981). In those cases, the trial courts abused their discretion by not allowing cross-examination of witnesses mental states because those witnesses mental limitations were clearly apparent on the stand. Our decision in Froehilich should not be interpreted to mean that so long as a witness mental limitations are not readily apparent from the witness behavior on the stand, cross-examination regarding his or her mental health is solely at the discretion of the trial court. Given the complexities of mental health limitations, a deeper analysis, as described above, is required" State v. Arreondo, 188 Wn.244 (emphasis added).

In United States v. Lindstrom, 698 F.2d 1154 U.S. App.(1983) the court said: "We hold that the jury was denied evidence necessary for it to make an informed determination of whether the witness testimony was based on historical facts as she percieved them or whether it was the product of a psychotic hallucination. The Jury was denied any evidence on whether this key witness was a schizophrenic, what schizophrenia means, and whether it

affects ones perceptions of external reality. The Jury was denied any evidence of whether the witness was capable of distinguishing reality from hallucinations. Such denial was reversible error." Such is the case here. There for Mr.Razo's convictions must be reversed.

2. THE TRIAL COURT DENIED MR.RAZO OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY ALLOWING A ERRONEOUS JURY INSTRUCTION, WHICH RELIEVED THE STATE OF PROVING EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

The erroneous Jury instruction relieved the State of proving Mr.Razo acted with the premeditated intent to cause the death of Amy McGee either as a principle or an accomplice thus relieving the State of proving every element of the crime charged beyond a reasonable doubt. Thereby it is a error of Constitutional magnitude and violated Mr.Razo's Constitutional right to a fair trial, and due process guaranteed by the U.S. Const. Amend V,VI, and XIV, and the Wash. Const. Art I section 3, and 22.

In State v. Byrd, 72 Wn.App. 774,868 P.2d 158 (1994) the court said: Under RAP 2.5(a)(3) a party may raise for the first time on appeal a "manifest error affecting a Constitutional right." Although technically the infirmity in the present instructions is in the definition of assault, the error is of Constitutional magnitude because it results in the omission of an element of the offense.

This brings the error within the ambit of RAP 2.5(a)(3) because the instructions are misleading and had identifiable consequences adverse to Byrd. State v. Lynn, 67 Wn.App. 339,835 P.2d 251 (1992) at 345.

Any time a requirement for conviction is not clearly stated in the instructions, a question of Constitutional due process is presented. Proof of every element beyond a reasonable doubt is a fundamental aspect of due process.

State v. Allen, 101 Wn.2d 355,678 P.2d 798 (1984); State v. Johnson, 100 Wn.2d 607,614,674 P.2d 145 (1983). Whether we refer to it as an "element" of the offense or a "technical term" requiring further definition, the instructions are incomplete without the inclusion of a clear statement of the requirement of the intent to cause apprehension and fear of bodily harm. The due process clauses of the United States and Washington State Constitutions require proof beyond a reasonable doubt "of every fact necessary to constitute" the "crime with which he is charged". In re Winship, 397 U.S. 358,364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); State v. Johnson, Supra at 623; State v. Davis, 27 Wn.App. 498,506,618 P.2d 1034 (1980). at 505.

An instruction which prejudicially relieves the State of its burden of proof or prejudicially deprives the defendant of the benefit of having the Jury pass upon a significant and disputed issue impacts a defendants right to a fair trial. State v. Van pilon, 32 Wn.App. 944,948,651 P.2d 234 (1982), review denied, 99 Wn.2d 1023 (1983).

State v. Fesser, 23 Wn.App. 422,595 P.2d 955 (1979); Prejudice may be demonstrated where an erroneous instruction is applied to a close factual question. State v. Theroff, 95 Wn.2d 385,622 P.2d 1240 (1980); State v. Fesser, Supra. Here the facts were close and disputed, prejudice is indicated, and Mr.Razo's Constitutional right to a fair trial implicated. Nor can Mr.Razo's contentions be dismissed without merit. See State v. Cronin, 142 Wn.2d 568,14 P.3d 752 (2000); State v. Teal, 152 Wn.2d 333,96 P.3d 974 (2004); State v. Roberts, 142 Wn.2d 471,14 P.3d 713 (2000).

The rule is clear in this State that this court will consider an assignment of error, irrespective of exceptions taken to the ruling of the trial court, where a Constitutional right of an accused is invaded. The court expressly so stated in State v. Warwick, 105 Wash.634,637, 178 P. 977 (1919).

Where, however, the instructions invade a Constitutional right of the accused, it is not necessary in order to have such - error reviewed, that an exception be taken and called to the attention of the trial court. State v. Crotts, 22 Wash.245, 60 P.403 (1900); State v. Jackson, 83 Wash. 514,145 P.470 (1915); Eckhart v. Peterson, 94 Wash. 379,162 P.551 (1917); See also State v. Marsh, 126 Wash. 142,217 P.705 (1923). State v. Cronin, 142 Wn.2d 568,74 P.3d 752 (2000) the court said: In addressing the harmless error issue, we first observe that the State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. See In re Winship, 397 U.S. 358,364 90 S.Ct. 1068,1072 25 L.Ed.2d 368 (1970); State v. Acosta, 101 Wn.2d 612,615, 683 P.2d 1069 (1984).

In Mr.Razo's case the erroneous Jury instruction allowed the Jury to convict him of attempted premeditated murder if it found he acted as a accomplice in any crime such as kidnapping, without having the State prove beyond a reasonable doubt he acted as a principle or an accomplice in "the" crime of premeditated attempted murder. See Wash.Rev.Code. §9A.08.020; State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000); State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004); State v. Roberts, 142 Wn.2d 471, 14

P.3d 713 (2000); State v. Rice, 102 Wn.2d 120,125,683 P.2d 199 (1984); and State v. Davis, 101 Wn.2d 654,682, P.2d 883 (1984). This instructional error cannot be deemed harmless and pursuant to the provisions of RAP 2.5(a)(3) the error is appropriately addressed in this appeal. Therefore this court should review Mr.Razo's Jury instruction argument on accomplice liability, and reverse his convictions of attempted first degree murder.

F. CONCLUSION

For the reasons stated above, Razo respectfully asks this Court to grant review and reverse the Court of Appeals.

DATED this 5th day of October,2021.

Respectfully Submitted,

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# APPENDIX (B)

victim, and I don't see anything objectionable to her being referred to as a victim by the state in their presentation.

No. 16, I think that we already dealt with that, Mr. Honeycutt.

MR. BRUNS: Correct. We dealt with that on Friday, your Honor. I wanted to memorialize it for purposes of the record.

THE COURT: We do record these proceedings.

MR. BRUNS: I know, your Honor. Lawyers get paid to be paranoid. For appellate purposes, I'm being paranoid and I want to make sure it was in writing.

I've giving the court some authority on that point, State vs. Michielli. That was the addition of a charge at the last second. This is the addition of a witness at the last second. I think such eleventh hour changes to the evidence is still applicable as far as the rule there is concerned, and I would ask the court to exclude Mr. Honeycutt's testimony under 8.3(b).

THE COURT: Well, for the reasons stated on Friday, I'm going to allow the state to call Mr. Honeycutt as a witness in this case if they choose to do so. Everybody has known he's kind of -- you know, he's on the bus and he's off the bus. Now he's back on the bus and everybody is pretty clear about what he's going to say. So there's no -- I guess there's no surprise.

MR. BRUNS: Except I haven't had a chance --

THE COURT: I guess the surprise may be that he's testifying but no surprise as to what he's going to say.

MR. BRUNS: That's not quite true, your Honor. I haven't been able to interview him because he's been a party up until Friday, well, technically up until this morning. This morning is when he pled out. Therefore, I could not make the necessary inquiries.

What he was going to say, that's really problematic. I spent a big chunk of the weekend going through his recorded statements again.

Your Honor probably didn't notice it when he pled out this morning. All he did was say yes or yes, your Honor. In his interviews, it is clear Mr. Honeycutt has a horrible speech impediment.

THE COURT: As everybody has said.

MR. BRUNS: Yes, and that makes it virtually impossible to understand most of what he's saying.

THE COURT: Well, that may be the same case here.

MR. BRUNS: It may be. It may very well be.

A lot of what is going on in the interviews, like Detective Duggan, you know, restating something to him. He'll shrug or nod his head or make an affirmative. Detective Duggan can't testify for him and can't do that here in the courtroom. He can't be led by the state here in

the courtroom. That makes his testimony that's recorded almost impossible to understand.

His statements being available, no. I won't stipulate to that at all. They may have provided the recordings, but the recordings are not intelligible. Therefore, he's not been disclosed as far as we're concerned, and I want to preserve that for the record.

MS. DAVIS: The screening interview that was provided to counsel, Mr. Honeycutt's speech has improved immensely since he's been in custody. He is quite understandable now.

I did have conversations. The jail has been able to fit us in for an interview at 12:15 today.

THE COURT: Okay. It's available to you.

MR. BRUNS: And I will take advantage of it, your Honor. I'm making a point on the record for the appellate court that I understand your ruling. I want to make it clear to the appellate court that because he's --

THE COURT: You're anticipating your client is going to get convicted.

MR. BRUNS: Lawyers get paid to be paranoid, your Honor. I'm just anticipating, as trial counsel should, always anticipate that and anticipate setting things up for an appeal. That's part of my duty.

The fact is that I have not been able to intelligibly

understand anything Mr. Honeycutt has said in the discovery that's been provided up to this point.

THE COURT: Okay.

MR. BRUNS: Doing it at the last second is not sufficient for adequate preparation.

THE COURT: All right. No. 17, any evidence of other crimes, wrongs or bad acts.

MR. BRUNS: That is there, your Honor. Quite frankly, it's a catchall because we don't know what sorts of things are going to be thrown into the mix by the state in the totality of the evidence where they try to implicate my client by intimating something else had gone on, that there was some kind of conspiracy going on, some kind of drug ring that my client was a peripheral member of, that there was cartel involvement in all of this and a hit was put out and my client was just a foot soldier for one of the cartels. It's sort of a reputation of what we talked about earlier under 404(b). That's what that's about.

THE COURT: Ms. Davis.

MS. DAVIS: Your Honor, at this point I don't think I'm objecting to this. I would encourage counsel, if he thinks that there's something in violation, to object. We can excuse the jury if necessary.

THE COURT: I'm going to defer until there's an objection that I can see in context of proffered evidence.

Q. And so were you able to identify Rome?
A. Eventually, yes.
Q. How?
A. She described Rome. She described him. So I had the description. She said that his wife or baby mama worked at Subway at the truck stop in Union Gap. I went to the truck stop and I contacted the manager and kind of gave what I had to him. He was able to -- he knew somebody that matched that scenario.

He gave me Misty Tutor's information, an employee there. I went to Misty house and contacted her. She said that her -- the father of her children was home, that he goes by Rome. She brought him downstairs, and I was introduced to Brandon Honeycutt, also known as Rome.

Q. What did you do at that point?
A. I took him to our central office and conducted an interview with him.
Q. How did Mr. Honeycutt present?
A. At the time he had a very heavy, heavy speech impediment. He had a very difficult time communicating, which was also a detail that Amy related to me that kind of matched what she was saying.
Q. After interviewing Brandon Honeycutt, what did that lead you to do next?
A. I presented a montage to him.

to identifying my client as this mysterious third person who was with her on the day she was shot, correct?

A. Correct.

Q. She had not known this person except for a couple of days maybe, correct?

A. Correct.

Q. Okay. So it was difficult trying to narrow down who this last person was, correct?

A. Yes, correct.

Q. And Rome, AKA Brandon Honeycutt, wasn't any help giving you a name that way either, was he?

A. No.

MR. BRUNS: Thank you. Nothing further.

THE COURT: Ms. Davis.

REDIRECT EXAMINATION

BY MS. DAVIS:

Q. Detective Duggan, how was Daniel Perez initially identified?

A. Initially the DEA, when they were contacted by Amy and informed of the incident where she was kidnapped and driven around town, they sat down with her. Based on the description of the tattoos and the long hair, they came up with Daniel Perez. I don't know exactly. I think they showed her a photograph and she said, yeah, that's the guy.

Q. Do you know when Amy McGee reported to the DEA that she had

A. Me, Freddy and Daniel; me, Freddy, Daniel and Rome.
Q. So you were walking. You've lost a shoe.
A. Mm-hmm.
Q. Then what happens?
A. And then Daniel hands the gun to Rome and told Rome, okay, do it.
Q. What happened?
A. Rome was shaking. He was like he couldn't do it, I guess. And then they give it to Freddy.
Q. Let me stop you for a minute. How was everybody standing when this is happening?
A. Like -- I don't know how to explain it, like in a half circle.
Q. Were you looking at everybody?
A. No.
Q. How were you?
A. I was -- like it was Daniel and then me and then Freddy, Rome and then Freddy.
Q. So were you all standing in a line together?
A. Yes.
Q. At this point, who handed the gun to Rome?
A. I don't recall.
Q. Rome says, I can't do it. And then what happened?
A. Freddy took the gun.
Q. What happened next?

A. He just stood there with his hand on the trigger. He was like -- he just stood there. Then Daniel said, fuck this, and he took the gun and he shot me.

Q. Were you standing up straight you when you were shot?

A. No.

Q. How were you standing when you were shot?

A. They made me put my head down towards the ground.

Q. Just your head bent over or --

A. My whole body like this.

Q. Would you like to stand up and demonstrate? I can help you.

MS. DAVIS: Your Honor, with the court's permission.

THE COURT: Yes.

Q. (By Ms. Davis) There's going to be a step down.

A. So I was like this.

Q. All right. Thank you.

MS. DAVIS: Your Honor, for the record, Ms. McGee demonstrated that she was bent all the way forward.

THE COURT: Yes, on her hands and knees.

MS. DAVIS: Thank you.

Q. (By Ms. Davis) Amy, where were the men standing when you were bent over like this?

A. Behind me.

Q. Were all three of them behind you?

A. Yes.

THE COURT: Mr. Bruns.

MR. BRUNS: There has been a development.

As you know, the state had closed without deciding to call Mr. Honeycutt as a witness. After court this morning, I went across the street and subpoenaed him to come and testify tomorrow morning as a witness for the defense. You may want to include a variation of WPIC 6.05, testimony of an accomplice. Their version says testimony of an accomplice given on behalf of the state. It's now testimony on behalf of the defense. I think it equally applies.

In addition, your Honor, we're going to be requesting to treat as an adverse witness.

THE COURT: Let's see how things go.

MR. BRUNS: Okay.

THE COURT: Doing that without actually testing the waters, I don't think, is appropriate. If it becomes obvious that he's hostile, I'll let you treat him in that fashion.

MR. BRUNS: Okay. It's not so much hostile as he is on antipsychotic medication. We discovered that when we interviewed him earlier.

THE COURT: Are you going to ask him about that?

MR. BRUNS: I will. It actually makes him more intelligible. Watching his video interview, it is virtually impossible to understand what he's saying. He makes this

loud clicking noise when he gets nervous or under pressure. He mumbles a lot and his voice stays low.

Every since he's been arrested he was diagnosed as schizophrenic as well as suffering from depression. They put him on Zoloft and an antipsychotic medication. Although he can be slow in responding, now he's intelligible. You can understand him. His answers are clear.

THE COURT: All right. I'll pull that out from the proposed instructions of the state and deal with it so it fits.

Do you have any comment about Mr. Honeycutt being called as a witness?

MS. DAVIS: No, your Honor. I don't have any comment other than the request to treat him as a hostile witness. I don't think it's appropriate to make that determination until he's here and needs to be treated as such and showing an indication that he's not going to answer questions. The fact that he's on medication, I don't think, is a reason to treat him as a hostile witness.

Additionally, I would let court and counsel know that due to the witness being called, especially Mr. Honeycutt, Ms. Brown as well, the state may have a rebuttal witness tomorrow. That would be Officer Ryan Urlacher of the Yakima Police Department. I bring that to the court and counsel's attention because I want to let everybody know that Officer

told to assist?

A. Yes.

Q. Okay. How did they want you to assist?

MS. DAVIS: Your Honor, objection, same.

THE COURT: I'll sustain the objection. You need to rephrase.

MR. BRUNS: Okay.

Q. (By Mr. Bruns) What were you told to do?

A. I was told to take the gun and shoot her.

Q. Did you participate in that?

A. No, I didn't.

Q. Now, these two men who were also in the car with you, was one of them Daniel Perez?

A. Yes.

Q. Now, these two men, did you see them before June 1st at Brian's house?

A. No.

Q. You don't recall testifying in your interview with me on June 10th --

MS. DAVIS: Your Honor, objection.

THE COURT: You're leading.

MR. BRUNS: Yes. I'm going to ask, your Honor, that I be allowed to treat him as a hostile witness. He was a defendant.

THE COURT: Are you putting yourself in a position

Q. And then you and Amy as well?
A. Me and Amy as well.
Q. Then what happened?
A. Then we were sitting there talking, chilling and just hanging out, and then they wanted some more stuff or whatever, and then they called somebody.
Q. Who called somebody?
A. Amanda.
Q. Then what happened?
A. Then like a little bit later in the meantime, that's when these two guys showed up.
Q. When you say two guys, who were those two guys?
A. Daniel and Freddy.
Q. Is one of those men in the courtroom today?
A. Yes, he is.
Q. Who?
A. Right there.
Q. Can you point.
A. *(Indicating.)*
Q. Could you describe what he's wearing.
A. He's wearing a pink shirt and brown pants and black shoes.

MS. DAVIS: Could the record reflect that he's identified the defendant.

THE COURT: It will.

MR. BRUNS: Objection, your Honor. This is

Q. When you say afraid, how could you tell she was afraid?
A. She was holding my hand. Then she was like, please don't let them hurt me. I'm like, I won't let them hurt you.
Q. What happened after that?
A. I kept pleading some more, and then they're like, we should just kill both of them.
Q. At that point did they take Amy out of the vehicle?
A. Yes, they did.
Q. How did they take Amy out of the vehicle?
A. They went to her side and opened the door and then pulled her out.
Q. Where was she sitting?
A. In the back on the left-hand side.
Q. Where were you sitting?
A. In the back on the right-hand side.
Q. How did they pull her out of the vehicle?
A. By her arms.
Q. What is Amy doing at this time?
A. Telling them no.
Q. What happened after they got Amy out of the vehicle?
A. Then they gave this towel to put on her head, and they told her to go up the hill right there and told her to lay down.
Q. Did Amy lay down?
A. Yes, she did.
Q. Did you get out of the car?

A. No, I didn't.
Q. Then what happened?
A. Then Freddy squeezed the trigger and nothing happened and then cocked it again, and then this time it shot.
Q. Where did it shoot?
A. In the head.
Q. Whose head?
A. Amy's.
Q. Who pulled the trigger?
A. Freddy did.
Q. After that, you said that you left the area?
A. Yes.
Q. These men met up with a woman; is that correct?
A. Yes.
Q. You said these men said they would hurt you too, correct?
A. Yes.
Q. How are you feeling at this time?
A. Afraid.
Q. Do you recall being interviewed by Detective Duggan?
A. Yes.
Q. Did he interview you twice?
A. Yes.
Q. During your interview on February 22, 2018, were you shown a photomontage by Detective Duggan?
A. Yes, I was.

Instruction No. 4. To convict the defendant of the crime of attempted murder in the first degree, each of the following elements must be proved beyond a reasonable doubt.

One, that on or about June, 1, 2016, the defendant or an accomplice did an act that was a substantial step toward the commission of murder in the first degree.

Two, that the act was done with the intent to commit murder in the first degree.

Three, the act occurred in the State of Washington.

Instruction No. 5. A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of a crime. A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she either, one, solicits, commands, encourages or requests another person to commit the crime or, two, aids or agrees it aid another person in the planning or committing the crime. The word "aid" means all assistance whether given by words, acts, encouragement, support or presence.

A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge

of the criminal activity of another must be shown to establish a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Instruction No. 6. A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

Instruction No. 7. A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

Instruction No. 8. Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose, and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

Instruction No. 11. To convict the defendant of the crime of kidnapping in the first degree, each of the following three elements of the crime must be proved beyond a reasonable doubt.

One, that on your about June 1, 2016, the defendant or

**INMATE**

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

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>FREDDY MUNOZ RAZO,<br><br>Appellant. | ) | No. 37131-0-III<br><br>ORDER DENYONG MOTION FOR RECONSIDERTION |

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of July 13, 2023 is hereby denied.

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:

REBECCA L. PENNELL
Chief Judge

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

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>FREDDY MUÑOZ RAZO,<br><br>Appellant. | ) | No. 37131-0-III<br><br>UNPUBLISHED OPINION |

FEARING, J. — A jury found Freddy Muñoz Razo guilty of attempted murder in the first degree and kidnapping in the first degree. In a statement of additional grounds (SAG), Muñoz Razo challenges his conviction, but we reject his challenge. Muñoz Razo primarily appeals his sentence and contends the sentencing court erroneously included three California convictions in his offender score. Because one of those convictions entailed a conviction under a recidivist statute and because two of the convictions lack comparability with the elements required under Washington criminal statutes, we agree with Muñoz Razo. We remand for lowering Muñoz Razo's offender score and for resentencing.

## FACTS

This appeal arises from the conviction of Freddy Muñoz Razo for the June 1, 2016 attempted murder and miraculous survival of Amy McGee.

Amy McGee served as a confidential informant for the United States Drug Enforcement Agency (DEA), after the DEA apprehended her transporting drugs from Pasco to Missoula, Montana. At the time of her shooting, she resided in Yakima with Brian Murphy. Murphy and McGee used unlawful drugs together. McGee's friend, Brandon Honeycutt, nicknamed "Rome," also dwelled at Murphy's house. Report of Proceedings (RP) at 295. A fourth person, Danette Garcia, periodically visited the home and met Amy McGee.

In late May 2016, Amy McGee met two men, Freddy Muñoz Razo and Daniel Perez, in Brian Murphy's house, although she did not then learn their respective names. Danette Garcia also saw Perez and Muñoz Razo at Murphy's house.

On the night of May 31, as Amy McGee walked from Brian Murphy's house, Freddy Muñoz Razo and Daniel Perez appeared in a sport utility vehicle (SUV). RP 297, 327. Muñoz Razo and Perez forcibly pushed McGee into the SUV. McGee still did not know the name of either of her hijackers. For several hours, the three drove in the SUV while Muñoz Razo and Perez sought someone that owed the men money for drugs. Although frightened, McGee did not then conclude that Muñoz Razo and Perez wanted to harm her. She concluded the duo, being under the influence of drugs, were angry and

"thinking weird thoughts." RP at 299. Muñoz Razo and Perez eventually returned to Murphy's home, where McGee fixed the men breakfast in an attempt to deescalate her condition of peril.

After breakfast on June 1, Amy McGee, presumably without the knowledge of Freddy Muñoz Razo and Daniel Perez, phoned a person named Rydell. Rydell retrieved McGee and ferried her to a DEA office, where McGee spoke with DEA agents, Manny Almaguer and Brian Frederickson, about her nocturnal and frightful travel with the two men, whose names she still lacked. The two DEA agents accompanied McGee to the Yakima Police Department, where McGee spoke with a detective.

While at the Yakima Police Department, Amy McGee worried about the presence of a man inside the police station, and she left the station on foot. While McGee walked on a city sidewalk, Freddy Muñoz Razo, Daniel Perez, and Brandon Honeycutt, in a SUV, approached McGee. Muñoz Razo drove the vehicle. The three men were cranky and nervous. McGee voluntarily entered the SUV, and the group journeyed to Brian Murphy's house. Danette Garcia saw Perez, Muñoz Razo, and Honeycutt present at the house that day.

Once at Brian Murphy's residence, Amy McGee entered Murphy's back shed. Freddy Muñoz Razo followed McGee. Muñoz Razo said to McGee, "I'm sorry; I'm so sorry," before proceeding to continuously punch McGee. RP at 303. Muñoz Razo wore gloves or other material enveloping his hands while punching McGee. Muñoz Razo next

repeatedly hit McGee with a pillowcase containing rocks. McGee screamed for Muñoz Razo to stop. RP at 303. McGee heard a cracking noise when Muñoz Razo struck her with the bag of rocks, and she assumed a tooth broke.

Freddy Muñoz Razo, Daniel Perez, and Brandon Honeycutt forced Amy McGee once again into the SUV. Muñoz Razo drove the quartet toward Wapato and stopped the SUV "in the middle of nowhere." RP at 305. Muñoz Razo later restarted the SUV and continued driving.

During the drive, Freddy Muñoz Razo's cell phone fell from his pocket and dropped behind his seat. Amy McGee retrieved the phone and called 911. McGee held the cell phone near her without saying anything, but Muñoz Razo heard the 911 operator ask, "what is your emergency." RP at 308. Muñoz Razo grabbed the phone and removed its battery.

The three men transported Amy McGee to a remote woody area. Daniel Perez grabbed her by the back of her shirt and forcibly removed her from the SUV. Perez, Freddy Muñoz Razo, and Brandon Honeycutt walked McGee from the vehicle. The three men stood in a line with McGee in front. At the direction of the trio, McGee knelt on her hands and knees with her head facing the ground. Perez instructed Honeycutt, who held a gun: "okay, do it." RP at 309. Honeycutt trembled and remarked that he could not pull the trigger. Muñoz Razo seized the gun from Honeycutt and stood behind McGee with his hand on the trigger. Muñoz Razo also halted from firing the gun. Perez uttered "fuck

this," grabbed the weapon from Muñoz Razo, and discharged a bullet into the back of McGee's head. RP at 310.

After being shot, Amy McGee acted as if dead. She held her breath and held still while the men poked and kicked her. After the men left, McGee wandered incoherently while seeking assistance.

On June 6, 2016, five days after the shooting, Yakima County Sheriff Deputy Wes Rasmussen was dispatched to an address in Wapato. At the location, Deputy Rasmussen found McGee lying naked under a tree. Rasmussen contacted medical support. Medical personnel transported McGee to a hospital in Toppenish. McGee told a first responder that she had walked for days.

Detective John Duggan met with Amy McGee several times while she convalesced in the hospital. Detective Duggan learned McGee's version of the events and arranged photomontages to identify the men that kidnapped and attempted to murder her. McGee positively identified Daniel Perez in the photomontage.

After Detective John Duggan suspected Brandon Honeycutt as a suspect, Honeycutt voluntarily provided a recorded statement. Honeycutt confirmed Amy McGee's story. Honeycutt only knew Daniel Perez as "D," but identified Perez from a photomontage. Honeycutt, however, did not know Freddy Muñoz Razo's identity.

During Detective John Duggan's investigation, he concluded that Freddy Muñoz Razo may be the unidentified suspect in the crime. Amy McGee identified Muñoz Razo

in a photomontage. Duggan sent the photos to a DEA agent in Montana, and the agent showed the photos to McGee.

PROCEDURE

The State of Washington charged Freddy Muñoz Razo with one count of attempted murder in the first degree, with a firearm enhancement, and one count of kidnapping in the first degree. The State alleged that Muñoz Razo, either acting as a principal or an accomplice, intentionally abducted and shot Amy McGee.

At trial, Amy McGee positively identified Freddy Muñoz Razo as one of the men who abducted her and was present during her shooting. Danette Garcia, the occasional visitor to Brian Murphy's residence, testified: "Like I said, I believe this [Muñoz Razo] is the gentleman but he does look different from when I did see him," three years earlier. RP at 374.

After the State rested its case, Freddy Muñoz Razo moved for dismissal due to insufficient evidence. The trial court denied the motion.

Freddy Muñoz Razo called Gail Brown, Strand Apples' general manager, to testify. Brown, who was in charge of Strand Apples' employment records, averred that Muñoz Razo worked for Strand Apples. Brown stated that Muñoz Razo had worked on May 31, 2016 and June 2, 2016 through June 4, 2016. Brown's records did not reflect that Muñoz Razo worked on June 1, 2016, the day of Amy McGee's shooting.

The defense also called Brandon Honeycutt to testify. Honeycutt stated that he

vaguely remembered June 1, 2016. He recalled being handed a gun to shoot Amy McGee, but he said, "no, I'm not doing it." RP at 423. Honeycutt positively identified Freddy Muñoz Razo as the third suspect involved in the crime against McGee.

The jury found Freddy Muñoz Razo guilty of first degree attempted murder and first degree kidnapping. The jury also found that Muñoz Razo committed attempted murder with a firearm.

At sentencing, Freddy Muñoz Razo objected to his counsel's continued representation due to purported ineffective assistance provided during trial. The trial court responded:

> The court finds that the strategy and tactics utilized by the defense in this case do not demonstrate ineffective assistance of counsel. In this court's opinion, it just demonstrates that you were simply encumbered by the facts, substantial evidence that would establish beyond a reasonable doubt that you were a participant in this heinous act. The jury so found that. The fact that the jury found you guilty of kidnapping and attempted first degree murder is not a sufficient basis to make a claim of ineffective assistance of counsel.
>
> The evidence is overwhelming to support that jury verdict. In this case, your claim of ineffective assistance of counsel fails also because you have failed to show that it prejudiced you in any fashion.

RP at 504. The trial court denied Muñoz Razo's request for a new trial, based on ineffective assistance of counsel, and his request for new counsel at sentencing.

During the sentencing phase of the case, Freddy Muñoz Razo requested an interpreter for the first time. Defense counsel then commented:

> during the course of my representation of Mr. Munoz-Razo,

> language was never an issue that came up. I asked him before the trial if he would feel more comfortable with an interpreter, and he said no. He felt like he could understand everything and could proceed through trial without an interpreter.

RP at 508. The trial court concluded that Muñoz Razo could understand the evidence presented at trial.

During sentencing, the State listed twelve past convictions, all of which Freddy Muñoz Razo garnered in California. Of the twelve convictions, the State requested that the trial court count eight of them toward Muñoz Razo's offender score. RP 508. The eight convictions included:

| Crime | Date of Sentence | Date of Crime |
|---|---|---|
| Taking a vehicle without consent | September 11, 2012 | August 28, 2012 |
| Accessing account information without consent | September 11, 2012 | August 28, 2012 |
| Possession of a blank check (forgery) | September 11, 2012 | August 28, 2012 |
| Receiving known stolen property | September 11, 2012 | August 28, 2012 |
| Theft of an automobile with a prior conviction for taking a vehicle without consent | September 11, 2012 | August 28, 2012 |
| Perjury | January 17, 2003 | January 13, 2003 |
| Possession of marijuana for sale | June 11, 1996 | May 31, 2996 |
| Taking a vehicle without consent | September 15, 1995 | August 16, 1995 |

The State argued that California's receiving known stolen property statute was comparable to Washington's identity theft statute. The State also argued that California's

forgery statute was comparable to Washington's forgery statute.

Defense counsel did not receive the State's sentencing memorandum until the Friday before the Monday sentencing hearing. Defense counsel did not request a continuance. Defense counsel also did not submit a sentencing memorandum or mitigating evidence on Freddy Muñoz Razo's behalf. Finally, defense counsel did not object to or argue against the State's position that Muñoz Razo's prior convictions were comparable to Washington offenses.

Freddy Muñoz Razo objected to the inclusion of two of the listed convictions on the basis that the State wrongfully attributed the crimes to him. He argued that, as a result of authorities changing his California Department of Corrections inmate code several times, California mistakenly listed him as the party being convicted. When questioned by the court, defense counsel acknowledged that the certified documents contained nothing to support Muñoz Razo's contention.

During the sentencing hearing, Freddy Muñoz Razo denied kidnapping or attempting to murder Amy McGee. Muñoz Razo expressed sympathy for Amy McGee and her family and added that he would die if one of his daughters suffered a tragedy like McGee's tragedy. He requested compassion from the court. Defense counsel requested that the trial court sentence Muñoz Razo at the bottom of the range, because Muñoz Razo was not the primary actor and his criminal record included only stale, theft-related convictions, as opposed to violent ones.

The sentencing court agreed with the State that all eight of Freddy Muñoz Razo's prior California convictions were comparable to Washington offenses. The court scored each prior conviction as one point. Thus, the court found Muñoz Razo's offender score to be eight. The trial court did not, however, annunciate any comparability analysis. With an offender score of eight, Muñoz Razo faced a standard range of 277.5 to 369.75 months' confinement on the first degree attempted murder charge and 51 to 68 months' confinement on the first degree kidnapping charge.

The sentencing court found the heinousness of the crime, Freddy Muñoz Razo's lack of respect for human life, the overwhelming evidence against Muñoz Razo, and his beating of Amy McGee before kidnapping her as aggravating factors. The court commented: "I have searched diligently for mitigating factors in this case, and I can't find any." RP at 530.

The sentencing court sentenced Freddy Muñoz Razo at the top of the range on both counts, imposing 369.75 months' confinement for the attempted murder and 68 months' for the kidnapping. The trial court imposed an additional 60 months' confinement based on the firearm enhancement on the attempted murder charge. In total, the trial court sentenced Muñoz Razo to 497.75 months' confinement.

## LAW AND ANALYSIS

On appeal, Freddy Muñoz Razo seeks to lower his sentence by reducing his offender score by three points. He contends that the counting of three California crimes

in his offender score violated Washington law because one of the crimes was a recidivist crime and two of the California crimes lack any comparable Washington crime. We agree.

Recidivist Crime

On appeal, Freddy Muñoz Razo argues that the trial court miscalculated his offender score by including one point based on a California conviction that does not qualify as a substantive crime because the conviction arose from a recidivist sentencing statute. Muñoz Razo refers to and challenges the inclusion of his California theft of an automobile with a prior conviction for taking a vehicle without consent conviction. The State concedes that Freddy Muñoz Razo's theft of an automobile with a prior conviction for taking a vehicle should not count toward his offender score. The State agrees with Muñoz Razo that this court should remand for resentencing and lower his offender score from eight to seven. We accept the State's concession.

Pursuant to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, a standard range sentence is determined by an offender score and offense seriousness level. RCW 9.94A.510; RCW 9.94A.530(1). An offender score is the sum of points an offender accrues from prior convictions rounded down to the nearest whole number. RCW 9.94A.525. Prior class A, B, and C felony convictions and certain prior gross misdemeanor convictions are included in the offender score. RCW 9.94A.525(2)(a)-(g).

This court reviews a sentencing court's calculation of a defendant's offender score de novo. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). A sentence based on an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010).

CAL. VEHICLE CODE § 10851(a) governs the substantive crime of theft and unlawful driving or taking of a vehicle. The statute declares:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment.

If an individual convicted of taking a vehicle without consent is subsequently convicted of the same offense later, he or she is punished under a recidivist statute, CAL. PENAL CODE § 666.5. This second California statute reads, in relevant part:

> (a) Every person who, having been previously convicted of a felony violation of Section 10851 of the Vehicle Code, or [other offenses] . . . regardless of whether or not the person actually served a prior prison term for those offenses, is subsequently convicted of any of these offenses shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or a fine of ten thousand dollars ($10,000), or both the fine and the imprisonment.

Before Freddy Muñoz Razo's 2012 convictions, the California Court of Appeal held that CAL. PENAL CODE § 666.5 "creates only enhanced punishment for repeat offenders, not a new substantive offense." *People v. Young*, 234 Cal. App. 3d 111, 115, 285 Cal. Rptr. 583 (1991). Since Muñoz Razo's conviction, the California Court of Appeal has clarified:

> Section 666.5 is an alternate punishment scheme that prescribes an elevated sentencing for recidivist car thieves. . . . Section 666.5 does not define a new offense and it is not an enhancement; it simply increases the punishment for the crime.

*People v. Lee*, 16 Cal. App. 5th 861, 869-70, 224 Cal. Rptr. 3d 706 (2017).

On September 11, 2012, Freddy Muñoz Razo pled, in California court, nolo contendere to a violation of CAL. PENAL CODE § 666.5(a). This conviction arose because California previously convicted Muñoz Razo of taking a vehicle without consent on September 15, 1995 pursuant to CAL. VEHICLE CODE § 10851(a). Freddy Muñoz Razo's conviction for theft of an automobile with a prior conviction is not a substantive crime. *People v. Lee*, 16 Cal. App. 5th 861, 869-70 (2017); *People v. Young*, 234 Cal. App. 3d 111, 115 (1991). Thus, this conviction is neither a prior felony nor a gross misdemeanor countable toward an offender score. RCW 9.94A.525(2)(a)-(g). The sentencing court committed legal error when scoring the conviction. Therefore, we remand to recalculate the offender score and to resentence Muñoz Razo.

Receiving Stolen Property Comparability

Freddy Muñoz Razo also asserts that two of his California convictions, receiving known stolen property and forgery, are neither legally nor factually comparable to Washington offenses. Accordingly, Muñoz Razo requests that this court remand for resentencing without the resentencing court scoring either of these convictions. Excluding the two convictions would reduce Muñoz Razo's offender score to five. The State responds that both of these crimes are comparable to one or more Washington statutes and, thus, were properly counted toward Muñoz Razo's offender score. The State also highlights that Muñoz Razo waived his right to challenge the California convictions' comparability. We first address the California conviction of receiving stolen property.

The State contends that Freddy Muñoz Razo waived his right to challenge the comparability of the California crime of receiving stolen property because he stipulated, before the sentencing court, to the conviction and did not object to the conviction's inclusion in his offender score. This same argument and our analysis in response applies to the comparability of the California crime of forgery.

A sentence is excessive if based on a miscalculated offender score. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 873, 50 P.3d 618 (2002). A defendant cannot agree to punishment in excess of the punishment established by the legislature. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74 (2002). Accordingly, a

defendant cannot usually waive a challenge to a miscalculated offender score if the sentencing error is a legal one. *In re Personal Restraint of Goodwin*, 146 Wn.2d at 873-74. Waiver may arise if the alleged error involves a defendant's agreement to facts or involves matters of a sentencing court's discretion. *In re Personal Restraint of Goodwin*, 146 Wn.2d at 874.

Freddy Muñoz Razo does not argue that the trial court's alleged miscalculation of his offender score arose from either his stipulation to facts or matters involving the sentencing court's discretion. Rather, Muñoz Razo contends that the court's comparability analysis was legally incorrect. Accordingly, Muñoz Razo did not waive his challenges to his miscalculated offender score on appeal.

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The foreign offense must be compared to a Washington statute in effect when the individual committed the foreign crime. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). The State bears the burden of establishing the comparability of out-of-state convictions. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). If a prior foreign conviction is not comparable, the trial court may not count the conviction toward the offender score. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

Washington law employs a two-part test to determine the comparability of a foreign offense. *State v. Thiefault*, 160 Wn.2d 409, 415 (2007). First, the court analyzes legal comparability by determining whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. *State v. Thiefault*, 160 Wn.2d 409, 415. Second, if the foreign offense's elements are broader than the Washington offense's elements, courts analyze factual comparability by determining whether the conduct underlying the foreign offense would have violated the comparable Washington statute. *State v. Thiefault*, 160 Wn.2d at 415. When determining factual comparability, the sentencing court may rely on facts in the foreign court's record that are admitted, stipulated to, or proved beyond a reasonable doubt. *State v. Thiefault*, 160 Wn.2d at 415. When a foreign statute is broader than Washington's statute, factual comparability analysis may not be possible because the defendant lacked any incentive to prove that he did not commit the narrower offense. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 257, 111 P.3d 837 (2005).

The State argues that California's receiving stolen property statute compares with Washington's identity theft statute and Washington's trafficking in stolen property statute. We first address the comparability with the Washington identity theft crime.

CAL. PENAL CODE § 496 governs the California offense of receiving stolen property. The California statute declares, in relevant part:

> (a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment.

Washington's identity theft statute, RCW 9.35.020, reads, in pertinent part:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.005 defines "financial information" for purposes of RCW 9.35.020 as:

> (1) "Financial information" means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:
> (a) Account numbers and balances;
> (b) Transactional information concerning an account; and
> (c) Codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identicard numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

We compare the elements of California's crime of receiving stolen property with Washington's crime of identity theft. Under CAL. PENAL CODE § 496, California criminalizes possessing *any* wrongfully-obtained property, while Washington, under RCW 9.35.020(1), only criminalizes the possession of "a means of identification or financial information." Unlike California, Washington requires that the victim of the theft be an actual, real person, as opposed to a legal entity. *State v. Fedorov*, 181 Wn. App. 187, 194, 324 P.3d 784 (2014). Finally, Washington requires more than mere

possession, use, or transfer of property; it also requires that an individual have the "intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). Under CAL. PENAL CODE § 496, on the other hand, an individual may be convicted simply for possessing stolen property. Intent to commit a crime is not required.

In short, one could commit the California crime of receiving stolen property and not commit the Washington crime of identity theft based on the same conduct. Because California's elements are broader than Washington's elements, the two crimes lack comparability.

Because the California crime of receiving stolen property does not compare with the Washington crime of identity theft, we must next determine whether the crime committed by Freddy Muñoz Razo in California factually fulfills the elements of the Washington crime of identity theft. Freddy Muñoz Razo pled nolo contendere to his California conviction. In California, the effect of a no contest plea is the same as that of a guilty plea. *People v. Wallace*, 33 Cal. 4th 738, 749, 93 P.3d 1037, 16 Cal. Rprtr. 3d 96 (2004). A guilty plea admits each element of the charged crime. *People v. Wallace*, 33 Cal. 4th at 749.

The California charging instrument declared, in relevant part, that Freddy Muñoz Razo:

> did unlawfully buy, receive, conceal, sell, withhold, and aid in concealing, selling, and withholding property, to wit, MISC CHECKS,

> which had been stolen and obtained by extortion, knowing that said property had been stolen and obtained by extortion.

CP at 106. Thus, the California complaint narrowed the factual allegations to the taking of financial instruments.

Freddy Muñoz Razo argues that he did not admit that the miscellaneous checks that became the subject of the California charges were either "a means of identification or financial information of another person," a critical element of the Washington crime of identity theft. RCW 9.35.020(1). Muñoz Razo further argues that the State of Washington did not prove beyond a reasonable doubt that the California purloined checks included information concerning account numbers and balances, transactional information concerning an account, codes, passwords, or other information held for the purpose of account access or transaction initiation, another element under the Washington identity theft statute. RCW 9.35.020(1)(a)-(c). Finally, he asserts that the California record lacks evidence that he intended to commit a crime other than possession, another element of identity theft under RCW 9.35.020(1).

The State characterizes Freddy Muñoz Razo's argument as absurd because if the checks he pled guilty to possessing did not bear financial information, they would be a blank piece of paper. The State of Washington argues that, if the miscellaneous checks contained no financial information, California would not have charged him with a felony conviction based on possessing stolen worthless papers.

We do not address whether the California checks must exhibit financial information, because we can rest our decision on another basis. The State did not prove that the miscellaneous checks belonged to a specific, actual person, as required by *State v. Fedorov*, 181 Wn. App. 187, 194 (2014), or that Muñoz Razo possessed the checks with the intent to commit a further crime. Therefore, we conclude that the conceded facts from the California prosecution for receiving stolen property do not necessarily fulfill all elements of the Washington crime of identity theft.

We now compare the California statute creating the crime of receiving stolen property with Washington's criminal statute of trafficking in stolen property. We already quoted the California statute. The Washington statute declares:

> (1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050. Washington's definition of "traffic" is found in RCW 9A.82.010(19):

> "Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.050 criminalizes possessing stolen property, but requires that the accused also intend to "sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." RCW 9A.82.010(19). In California, an individual may be guilty of simply possessing property he or she knows to be stolen, without considering

whether the individual intended to transfer the stolen property to another. A person could be convicted of receiving stolen property pursuant to CAL. PENAL CODE § 496 without being convicted under RCW 9A.82.050. Therefore, the two statutes lack comparison.

This court must also assess whether the California crime committed by Freddy Muñoz Razo fulfills the elements of the Washington crime of trafficking in stolen property. Neither the California information nor any other evidence the State of Washington forwarded establishes that Muñoz Razo intended to sell or otherwise transfer the miscellaneous checks to another person. Nor did Muñoz Razo stipulate to such facts when he pled guilty. The State thus failed to carry its burden in proving the necessary Washington elements beyond a reasonable doubt.

After a wearying analysis, we conclude that the California crime of receiving stolen property does not legally compare to any Washington crime. We also conclude that the conduct of Freddy Muñoz Razo, when committing the California crime, did not factually complete the elements of any Washington crime. Therefore, on remand, the resentencing court should not include the California crime in Muñoz Razo's offender score.

Forgery Comparability

Freddy Muñoz Razo's sentencing court scored Muñoz Razo's conviction of forgery in California as one point toward Muñoz Razo's offender score. On appeal, as it did before the sentencing court, the State of Washington contends that California's

forgery statute is comparable to Washington's forgery statute.

CAL. PENAL CODE § 475 governs the offense of forgery. The statute declares, in relevant part:

> (b) Every person who possesses any blank or unfinished check, note, bank bill, money order, or traveler's check, whether real or fictitious, with the intention of completing the same or the intention of facilitating the completion of the same, in order to defraud any person, is guilty of forgery.

Washington's forgery statute, RCW 9A.60.020, proclaims, in pertinent part:

> (1) A person is guilty of forgery if, with intent to injure or defraud:
> (a) He or she falsely makes, completes, or alters a written instrument or;
> (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

"Falsely make" is defined in RCW 9A.60.010:

> (5) To "falsely make" a written instrument means to make or draw a complete or incomplete written instrument which purports to be authentic, but which is not authentic either because the ostensible maker is fictitious or because, if real, he or she did not authorize the making or drawing thereof;

Washington's forgery provision expressly requires proof that the accused either: (1) falsely made, completed, or altered a written instrument, or (2) possessed a written instrument while knowing it to be forged. RCW 9A.60.020(1)(a)-(b). CAL. PENAL CODE § 475(b) criminalizes simple possession of a blank and unfinished check or other written instrument, if the accused intended to complete or facilitate the completion of the instrument. Therefore, a person could be convicted of forgery pursuant to CAL. PENAL

CODE § 475(b) without being convicted of forgery under RCW 9A.60.020(1). Because California's elements are broader than Washington's elements, the California statute does not legally compare to RCW 9A.60.020(1).

We must also assess whether the undisputed facts of Freddy Muñoz Razo's California crime of forgery qualify for a conviction under the Washington statute prohibiting forgery. Muñoz Razo pled no contest to his CAL. PENAL CODE § 475(b) conviction, and thus admitted to each element of the charged crime. *People v. Wallace*, 33 Cal. 4th 738, 749 (2004). The California information read that Freddy Muñoz Razo:

> possessed a blank and unfinished check, note, bank bill, money order, and traveler's check with the intention of completing the same and the intention of facilitating the completion of the same, in order to defraud a person.

CP at 107.

Based on the charges brought by the State of California, Freddy Muñoz Razo contends that he did not admit that he made, completed, or altered a written statement, nor that he knew the written material to be falsely made, completed, or altered. Muñoz Razo argues that the State of Washington failed to present any documentation that proved either of these facts beyond a reasonable doubt. We agree with Muñoz Razo. On remand, the resentencing court should exclude, in the offender score calculation, the California crime of forgery.

Ineffective Assistance of Counsel

Freddy Muñoz Razo asserts that trial defense counsel provided ineffective assistance at his sentencing hearing by (1) not sufficiently preparing, (2) not objecting to the sentencing court's treatment of Muñoz Razo's past convictions as comparable offenses, (3) waiving Muñoz Razo's ability to argue that some of his past convictions qualified as the same criminal conduct, (4) taking positions contrary to Muñoz Razo's interests, and (5) not presenting mitigating evidence. Muñoz Razo requests that this court remand for resentencing. We decline to address this assignment of error since we have already declared the need for resentencing. Although Muñoz Razo does not identify any mitigating information for his sentencing that trial counsel should have tendered, counsel may present any such information on remand. Muñoz Razo may also argue, during resentencing, that some of his past convictions constituted the same criminal conduct.

STATEMENT OF ADDITIONAL GROUNDS

Freddy Muñoz Razo forwards multiple assignments of error in his SAG. We reject all of them.

Cross-Examination

Freddy Muñoz Razo asserts that the trial court denied him his constitutional right to confront witnesses against him by disallowing his cross-examination of Brandon Honeycutt about the latter's diagnosed schizophrenia and the symptoms resulting from

the mental disorder. Muñoz Razo claims the questioning would have detracted from Honeycutt's credibility and led to a different trial outcome.

During direct examination of Brandon Honeycutt, Freddy Muñoz Razo's counsel asked, "Do you have any mental health problems?" and "Are you on any medications, Mr. Honeycutt?" RP at 430. On both occasions, the State objected and the trial court sustained because the questions were beyond the scope of examination.

Freddy Muñoz Razo, not the State, called Brandon Honeycutt to testify. RP 408. Thus, the trial court should not have excluded the testimony based on the questioning involving a subject beyond subjects explored by the State during its questioning. The evidence was still inadmissible for another reason. The court of appeals must uphold the trial court as long as a proper basis can be found even though the trial court did not rely on that particular theory. *State v. Heiner*, 29 Wn. App. 193, 198, 627 P.2d 983 (1981).

In *State v. Froehlich*, 96 Wn.2d 301, 306-07, 635 P.2d 127 (1981), the Washington Supreme Court elucidated when a witness' testimony about his or her mental illness may be elicited:

> A witness' credibility is always at issue, but it was particularly so in this highly unusual setting. The mental defects of the witness were clearly demonstrated to the trial court and jury by the extreme state of nervousness. A review of the record made by the trial court in expressing its concerns makes it equally obvious to this court on appeal. *Where, as here, the mental disability of a witness is clearly apparent and his competency is a central issue in the case, the jury need not be left in ignorance about that condition or its consequences.*

(Emphasis added.)

Unlike the witness in *State v. Froehlich*, Brandon Honeycutt did not exhibit a nervous state. Honeycutt's mental disability was not apparent. His competence was not a central issue. At trial, defense counsel stated, after medical professionals placed Honeycutt on antipsychotic medication, "he's intelligible. You can understand him. His answers are clear." RP at 385. As the State argues, the record does not support that Honeycutt's illness affected his ability to truthfully and accurately testify about the crime.

Jury Instruction

Freddy Muñoz Razo argues that the trial court improperly allowed an erroneous jury instruction to be presented on accomplice liability. Nevertheless, Muñoz Razo did not object to the jury instruction during trial.

RAP 2.5(a) governs issues initially raised on appeal, and states, in relevant part:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

Freddy Muñoz Razo waived his challenge to the jury instruction.

Identification Procedures

Freddy Muñoz Razo contends that law enforcement, when conducting the photomontages, engaged in an unfair identification procedure that violated his constitutional rights. He challenges the photomontage which Detective John Duggan

arranged and DEA Agent Lee Herd presented to Amy McGee. From this photomontage, McGee positively identified Muñoz Razo.

During trial, when the State offered the photomontage into evidence, Freddy Muñoz Razo did not object. In fact, defense counsel stated that he had "no objection" to the photomontage's introduction. CP at 316. Thus, Muñoz Razo waived any error.

Ineffective Assistance of Counsel

Finally, Freddy Muñoz Razo presents ineffective assistance of counsel arguments different from those in his appellate counsel's brief. Muñoz Razo contends that trial defense counsel inadequately investigated Muñoz Razo's locations on the date of Amy McGee's shooting, failed to interview or subpoena witnesses regarding his whereabouts, failed to produce a police report regarding a stolen vehicle around the time of McGee's shooting, only met with him a few times over the multiple years counsel represented him, and neither gave Muñoz Razo his discovery nor went over the discovery with him.

RAP 10.10 governs SAGs. The rule declares, in relevant part:

> (c) Citations; Identification of Errors. . . . Except as required in cases in which counsel files a motion to withdraw as set forth in rule 18.3(a)(2), the appellate court is not obligated to search the record in support of claims made in a defendant's statement of additional grounds for review. *Only documents that are contained in the record on review should be attached or referred to in the statement*.

(Boldface omitted) (emphasis added).

Any facts supporting Freddy Muñoz Razo's allegations with regard to ineffective assistance of counsel lie outside the trial court record. Thus, this court is unable to determine whether any of Muñoz Razo's contentions are true, let alone analyze whether defense counsel provided ineffective assistance on any of the alleged grounds.

CONCLUSIONS

We affirm Freddy Muñoz Razo's convictions for attempted murder in the first degree and first degree kidnapping. We hold that three California criminal convictions included in the sentencing court's offender score should be excluded. We remand to the trial court to resentence Muñoz Razo on the basis of an offender score of 5.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, A.C.J.

Lawrence-Berrey, J.

*Renee S. Townsley*
*Clerk/Administrator*

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# *The Court of Appeals of the State of Washington Division III*

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CASE # 371310
State of Washington v. Freddy Munoz Razo
YAKIMA COUNTY SUPERIOR COURT No. 161021340

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
c: **E-mail** Honorable Richard H. Bartheld

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