

No. 42570-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALLAN R. SIMMONS,

Appellant.

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

The Honorable Anne Hirsch, Judge
Cause No. 09-1-00693-1

BRIEF OF RESPONDENT

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A. STATEMENT OF THE ISSUES.

1. Whether this court will consider Simmons's claims when the trial court did not address them on remand.
2. If this court does consider Simmons's claims, whether Simmons's counsel's decisions to (1) concede that Simmons's Illinois aggravated battery conviction is comparable to Washington's offense of second degree assault, and (2) allow Simmons to participate in a pre-sentence interview constitute ineffective assistance of counsel.
3. If this court does consider Simmons's appeal, whether the trial court's finding that Simmons has the present or future ability to pay legal financial obligations was clearly erroneous.

B. STATEMENT OF THE CASE.

1. Procedural History

On October 15, 2009, a jury found Allan R. Simmons guilty of first degree rape and second degree assault with sexual motivation. RP 3. The trial court subsequently sentenced Simmons under the Persistent Offender Accountability Act (POAA) to life without the possibility of parole. CP 118.¹ He appealed his sentence, arguing (1) that his two convictions violate double jeopardy principles and (2) that his prior Illinois robbery conviction is not comparable to a most serious offense in Washington under

¹ Unless stated otherwise, all cites to clerk's papers reference the Appellant's Supplemental Designation of Clerk's Papers.

the POAA. Id. at 116. The court agreed, remanding Simmons's case for re-sentencing. Id.

On July 5, 2011, the court issued a mandate, id. at 114; and on September 9, 2011, Simmons was re-sentenced as a nonpersistent offender under RCW 9.94A.712,² without the second degree assault with sexual motivation and Illinois robbery convictions, to 160 months to life in prison. RP 13; State's CP 3. Reinstating her original conclusion, the judge also ordered Simmons to pay \$600 in court costs, finding that he had the ability or likely future ability to payback his legal financial obligations (LFOs). RP 14; State's Supp. CP.

2. Statement of Facts

According to an Illinois State indictment, Simmons was charged with two counts of aggravated battery on July 28, 2005. CP 66-67. One indictment stated that Simmons "knowing [sic] caused great bodily harm to Billy Roberts, in that he struck Billy Roberts on or about the face." Id. at 66. On September 7, 2005, Simmons pled guilty to one count of aggravated battery after stipulating to the State's factual basis:

² RCW 9.94A.712 is currently codified as RCW 9.94A.507.

MS. KLEIN [an Illinois State attorney]: . . . If this case were to go to trial on count 1 of the indictment, the State would call witnesses who would testify beyond a reasonable doubt that on July 14th of this year [2005] this defendant Allan Simmons did knowingly cause great bodily harm to a Billy Roberts in that he struck Billy Roberts on or about the face and head in DeKalb County, State of Illinois.

MS. POLITTE [Simmons's attorney]: *So stipulated.*

CP 73-74, 75 (emphasis added).

On November 9, 2009, Simmons admitted to Officer Andrew Scroggs in a pre-sentence investigation that he had three prior felony convictions. CP 100. Elaborating on the facts that surrounded his aggravated battery conviction, Simmons told Scroggs that "he was in a vehicle with a racist co-worker who made some off color remarks toward him. . . . [And] that they both exited the vehicle to fight and he broke the victim's jaw. . . ." *Id.* Scroggs stated that Simmons attempted to minimize his 2005 aggravated battery conviction, "implying that his victim deserved a broken jaw for the remarks that he made." CP 102.

At Simmons's first sentencing, Simmons's counsel conceded that his aggravated battery offense is comparable to Washington's offense of assault in the second degree:

In regards to the foreign conviction for aggravated battery, the court in State v. Franklin,³ held that such a conviction from the State of Illinois is legally and factually comparable to the charges of assault second degree under Washington law. But for that case, counsel would argue that aggravated battery should not be considered a strike offense for the purpose of determining whether the defendant is a persistent offender. . . .

CP 112. The State also argued that the two offenses are comparable. CP 62-63.

Simmons did not challenge his counsel's concession on his first appeal and, on remand, both the State and Simmons's counsel again concluded that the two offenses are comparable:

Both Mr. Jefferson [Simmons's counsel] and I have agreed that the criminal history, the score for Mr. Simmons would be a three. That is based upon the aggravated assault conviction out of Illinois, which would count as a two-point multiplier and has been conceded by the defense at the prior sentencing and this one. . . .

RP 4, 6 ("THE COURT: Mr. Jefferson, just from the beginning I want to make sure that both you and Mr. Simmons are in agreement with the criminal history. MR. JEFFERSON: That is correct, Your Honor."). Simmons never objected to Scroggs's pre-

³ State v. Franklin, 46 Wn. App. 84, 729 P.2d 70 (1986), *rev'd on other grounds*, State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987).

sentence investigation or the trial judge's finding that Simmons had the ability to pay LFOs.

C. ARGUMENT.

1. Simmons's arguments cannot be considered because the trial court did not address them on remand.

Rules of Appellate Procedure (RAP) 2.5(c)(1) provides "If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." Courts, however, have not permitted RAP 2.5(c)(1) to allow review of every issue not raised in a prior appeal: "This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

In Barberio, the defendant was convicted of second and third degree rape. Id. at 49. An exceptional sentence was imposed at sentencing, which the defendant did not challenge on appeal. Id. The Court of Appeals reversed the third degree rape conviction,

affirmed the second degree rape conviction, and remanded for further proceedings. Id. The State chose not to retry the defendant for third degree rape. Id. At re-sentencing, the defendant—for the first time—(1) challenged the aggravating factors the court found at the first sentencing, and (2) argued that because his offender score was reduced there should be a proportionate reduction in his exceptional sentence for second degree rape. Id. at 49-50. The trial court was not persuaded, and implemented the same exceptional sentence it imposed at the first sentencing. Id. at 50.

The defendant appealed again; and both the Court of Appeals and the Supreme Court affirmed. Id. In affirming his sentence, the Supreme Court explained that RAP 2.5(c)(1) gives trial courts discretion to revisit issues not raised on appeal and, if the trial court exercises its discretion, the appellate court has the option of reviewing that issue. Barberio, 121 Wn.2d at 51. But in that case, the Barberio court emphasized that the defendant's arguments could not be considered because "the trial court did not exercise its independent judgment to review and reconsider its earlier sentence." Id. Instead, the trial court "made only corrective changes in the amended judgment and sentence," prohibiting the appellate court's review. Id.

Similarly, in State v. Kilgore, 167 Wn.2d 28, 33, 216 P.3d 393 (2009), the defendant was convicted of three counts of rape of a child and four counts of child molestation. Id. An exceptional sentence was imposed. Id. On appeal, in which the defendant did not challenge his exceptional sentence, two of the counts were reversed and the remaining five affirmed. Id. at 33-34. The mandate issued before the trial court amended the judgment and sentence to reflect the appellate court's decision and, in the interim, the U.S. Supreme Court issued its decision in Blakely v. Washington, 542 U. S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Kilgore, 167 Wn.2d at 34.

On remand, after the State declined to retry the defendant on the reversed charges, the defendant sought to apply the Blakely requirements and have the exceptional sentence vacated. Kilgore, 167 Wn.2d at 34. The trial court refused, the defendant appealed, and both the Court of Appeals and the Supreme Court affirmed the trial court's dismissal. Id. at 44.

In affirming the defendant's dismissal, the Kilgore court again held that RAP 2.5(c)(1) permits trial courts to revisit issues that were not raised in the earlier appeal, and stated that if the trial court does so—and exercises its discretion in regard to it—the

issue is restored for appeal. Id. at 38-39; see also State v. Rowland, 160 Wn. App. 316, 324, 249 P.3d 635 (2011) (“The decision to simply correct a judgment and sentence is not an appealable act of independent judgment by the trial court.”). “The fact that the trial court had discretion to reexamine Kilgore’s [the defendant’s] sentence on remand is not sufficient to revive his right to appeal. *Our rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue.*” Kilgore, 167 Wn.2d at 43 (emphasis added).

The mandate in this case issued on July 5, 2011, CP 114, and Simmons was re-sentenced on September 9, 2011, RP 1, State’s Supp. CP. At Simmons’s first sentencing, his counsel conceded that his aggravated battery offense is comparable to Washington’s offense of assault in the second degree. CP 112. Simmons’s counsel did not mention this issue in his first appeal, and he conceded again at Simmons’s re-sentencing that the two offenses are comparable. RP 4, 6. Similarly, his counsel never objected to either the pre-sentence investigation or the judge’s finding that Simmons had the ability to pay LFOs. See, e.g., RP 14. Like Barberio and Kilgore, the re-sentencing court only made corrective changes to Simmons’s sentence by simply re-sentencing

him without his assault in the second degree with sexual motivation and prior Illinois robbery convictions. RP 3-4.

The issues of whether these two offenses are comparable, whether the pre-sentence investigation violated his Sixth Amendment right to counsel, or whether Simmons had the ability to pay LFOs ceased to be appealable (1) when the Court of Appeals issued its mandate and (2) when the trial court took no independent action on remand. Simmons cannot now challenge them on his second appeal.

2. If this court does consider Simmons's appeal, his trial counsel was effective because his (1) Illinois aggravated battery conviction is comparable to Washington's offense of second degree assault, and (2) Sixth Amendment right to counsel was not violated.

While appellate courts review claims of ineffective assistance of counsel *de novo* after considering the entire record, State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995)(citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988)—their review always begins with a strong presumption that counsel's performance was effective, Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). As with all ineffective

assistance of counsel claims, the Strickland rule governs: appellants must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance was prejudicial to their case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(quoting Strickland, 466 U.S. at 687).

- a. Simmons's Illinois aggravated battery conviction is comparable to Washington's offense of second degree assault because (1) the elements of the two offenses are substantially similar and (2) Simmons's punch that broke Roberts's jaw constitutes second degree assault in Washington.

As to Strickland's first prong, appellants must show that their "counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 688). In this case, Simmons asserts that his 2005 Illinois aggravated battery conviction is not comparable to Washington's offense of second degree assault; and that his counsel therefore committed ineffective assistance when he said that the two offenses were comparable. Appellant's Opening Brief (Appellant's Brief) at 9.

Under RCW 9.94A.525(3), foreign convictions are to be classified according to comparable Washington offenses. In re

Pers. Restraint of Lavery, 154 Wn.2d 249, 254, 111 P.3d 837 (2005).⁴ Washington courts review *de novo* a sentencing court's decision to count a prior conviction, employing a two-part test to determine if a "foreign crime" is comparable to a Washington offense:

A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.

State v. Thiefault, 160 Wn.2d 409, 414, 415, 158 P.3d 580 (2007)(citing Morley, 134 Wn.2d at 606). The State may

prove factual comparability by producing certified copies of foreign charging documents and evidence that the defendant pleaded guilty *if the law of the state wherein the defendant entered the plea, at the time of the plea, provided that such a plea constituted an admission of the facts alleged in the charging documents*.

⁴ While some of the following cases analyze defendants' foreign convictions to determine their comparability for purposes of the POAA, the same comparability analysis applies for out-of-state convictions under RCW 9.94A.525(3). See, e.g., State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999)(citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); see, e.g., State v. Wiley, 124 Wn.2d 679, 684, 880 P.2d 983 (1994)). Ford analyzed a defendant's foreign convictions under RCW 9.94A.360(3), which was later recodified as RCW 9.94A.525(3) by the Laws of 2001, ch. 10, § 6. Ford, 137 Wn.2d at 479.

State v. Releford, 148 Wn. App. 478, 483, 200 P.3d 729 (2009)(emphasis added).

The “the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt,” Thiefault, 160 Wn.2d at 415 (citing Lavery, 154 Wn.2d at 258), and it may also consider information that the defendant has “acknowledged,” RCW 9.94A.530(2); see, e.g., State v. Southerland, 43 Wn. App. 246, 250, 716 P.2d 933 (1986). If defendants do not object to information contained in a pre-sentence report or to criminal history presented at sentencing, the information is considered “acknowledged.” RCW 9.94A.530(2); see, e.g., Southerland, 43 Wn. App. at 250.

Simmons’s argument seems to ignore the Court of Appeals’ decision in Franklin—which held that Illinois’s aggravated battery offense and Washington’s offense of assault in the second degree are comparable. Id. at 88. In Franklin, the defendant argued that “the court erred when computing his offender score by including an out-of-state conviction for aggravated battery and assigning a score of 3 to that conviction.” Id. at 87. While Franklin held that the trial court improperly calculated the defendant’s offender score, it emphasized that “*the definitions of aggravated battery in Illinois and*

assault in the second degree in Washington are comparable. . . .” *Id.* at 88 (emphasis added). The Franklin court compared Illinois’s 720 ILL. COMP. STAT. 5/12-4(a)⁵ with a Washington second degree assault statute that no longer exists,⁶ but Franklin still stated that Illinois’s offense of aggravated battery “matches the Washington offense of assault in the second degree. . . .” *Id.* at 87.

Simmons’s trial counsel came to this same conclusion, stating at Simmons’s first sentencing that he considered the Franklin court’s holding dispositive—and Illinois’s conviction of aggravated battery is comparable to Washington’s offense of second degree assault. CP 112. The State agreed with Simmons’s counsel’s conclusion, arguing that the two offenses are both legally and factually comparable. *Id.* at 62-63. At Simmons’s re-sentencing, the State and Simmons’s counsel reaffirmed their conclusions that the two offenses are comparable. RP 4, 6.

Regardless of Franklin’s, the State’s, or Simmons’s counsel’s previous determinations, however, Illinois’s aggravated

⁵ This section was recently rewritten by 2009 ILL. LAWS 1551. See 720 ILL. COMP. STAT. 5/12-3.05(a).

⁶ Washington’s former RCW 9A.36.020 stated that “(1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he: . . . (b) shall knowingly inflict grievous bodily harm upon another with or without a weapon. . . .” Franklin, 46 Wn. App. at 87.

battery offense is both legally and factually comparable to Washington's offense of assault in the second degree.

First, the two offenses are legally comparable. Simmons pled guilty to violating 720 ILL. COMP. STAT. 5/12-4(a), which states: "A person who, in committing a battery, intentionally or knowingly causes *great bodily harm*, or permanent disability or disfigurement commits aggravated battery." Emphasis added; CP 75. Washington's offense of second degree assault states that "A person is guilty of assault in the second degree if he or she . . . intentionally assaults another and thereby recklessly inflicts *substantial bodily harm*." RCW 9A.36.021(1)(a)(emphasis added). Simmons claims that the two offenses are not legally comparable because "The Illinois definition of "great bodily harm" is broader than Washington's definition of "substantial bodily harm."" Appellant's Brief at 9-10.⁷ But despite Simmons's claims, Illinois's

⁷ To support his assertion, Simmons cites In re Keith C., 880 N.E.2d 1157 (Ill. App. Ct. 2007), explaining that in Illinois a person commits aggravated battery when he inflicts a cut that requires four staples. Appellant's Brief at 10. Keith's analysis, however, only mentions the victim's injuries in passing—we only know that the defendant intentionally threw a brick at the victim's car, causing her head to bleed and to almost lose consciousness. Keith, 880 N.E.2d at 1162. We are also told that the victim was later taken to the hospital and received four staples above her right ear. Id.

Given these details, it is easy to imagine that under certain circumstances, such actions would also constitute second degree assault in Washington. RCW 9A.36.021(1)(a).

definition of “great bodily harm” is substantially similar to Washington’s definition of “substantial bodily harm.”

“Great bodily harm” in Illinois is defined by state common law. See, e.g., People v. Figures, 576 N.E.2d 1089, 1092 (Ill. 1991). Defining “bodily harm” (*i.e.*, not “great bodily harm”), Illinois courts have stated that ““although it may be difficult to pinpoint exactly what constitutes bodily harm for the purposes of the statute, *some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent, is required.*”” Id. (emphasis added)(quoting People v. Mays, 437 N.E.2d 633, 635-36 (Ill. 1982)). Applying Mays’s definition to “great bodily harm,” the Figures court explained, “Because great bodily harm requires an injury of a graver and more serious character than an ordinary battery, simple logic dictates that the injury must be more severe than that set out in the Mays definition. The word “great” must be given effect in construing the aggravated battery statute. . . .” Id. at 1092.

One Illinois court stated that ““Great,” . . . , means “remarkable in magnitude, power, intensity, degree or effectiveness.”” People v. J.A., 784 N.E.2d 373, 379 (Ill. App. Ct. 2003)(Gallagher, J., concurring)(quoting Webster’s Third New

International Dictionary 994 (1993)). It follows then that—in Illinois—“great bodily harm” constitutes physical pain or damage to another’s body that is remarkable in magnitude, power, etc.

Washington defines “substantial bodily harm” as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(b). RCW 9A.04.110(b) does not, however, define “substantial”—a word Washington’s Supreme Court recently analyzed in State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011):

We hold . . . that the term “substantial,” as used in RCW 9A.36.021(1)(a), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence. While we do not limit the meaning of “substantial” to any particular dictionary definition, we approve of the definition cited by the dissent below: “considerable in amount, value, or worth.”

McKague, 172 Wn.2d at 806 (quoting Webster’s Third New International Dictionary 2280 (2002)). It follows then that—in Washington—“substantial bodily harm” constitutes an injury to another’s body that, while temporary, results in considerable disfigurement, loss, or impairment.

Illinois’s “great bodily harm” element is substantially similar to Washington’s “substantial bodily harm” element—as Illinois requires remarkable physical pain or damage and Washington requires considerable disfigurement, loss, or impairment. The two offenses are also substantially similar because they both require that the defendant act with specific intent. 720 ILL. COMP. STAT. 5/12-4(a); RCW 9A.36.021(1)(a).

Second, there is no doubt that Simmons’s aggravated battery conviction is factually comparable to Washington’s offense of second degree assault:

- An indictment alleged that Simmons knowingly⁸ caused great bodily harm to Roberts when he struck Roberts’s face, CP 66;
- Simmons pled guilty to aggravated battery, *id.* at 75, stipulating to the State’s factual basis (which essentially recited the information contained in the indictment) at his Illinois plea hearing, *id.* at 74;
- Simmons told Officer Scroggs that he broke Roberts’ jaw—which he said Roberts deserved because he was racist, *id.* at 100, 102; and
- At his re-sentencing, Simmons did not object to Officer Scroggs’s pre-sentence investigation or to his criminal history, RP 4, 6.

⁸ As mentioned above, the indictment stated “knowing”—not “knowingly.” CP 66. But because of 720 ILL. COMP. STAT. 5/12-4(a)’s language, the State is confident that the indictment intended to state “knowingly.”

These facts are significant because (1) Illinois law states that a defendant's guilty plea admits every material fact alleged in an indictment and all elements of a charged offense, see, e.g., People v. Caplinger, 514 N.E.2d 1221, 1224 (1987), which in turn permits a Washington sentencing court to consider such facts as admitted, Releford, 148 Wn. App. at 483; (2) facts that defendants stipulate to may also be considered, Thiefault, 160 Wn.2d at 415 (citing Lavery, 154 Wn.2d at 258); and (3) information contained in a pre-sentence report or criminal history presented at sentencing that are not objected to are considered "acknowledged," RCW 9.94A.530(2); see, e.g., Southerland, 43 Wn. App. at 250.

A person commits second degree assault in Washington if he intentionally breaks another person's jaw. RCW 9A.36.021(1)(a).⁹ Simmons's Illinois aggravated battery offense is therefore factually comparable to Washington's offense of second degree assault.

Finally, in light of Franklin and the offenses' legal and factual comparability, it is hard to imagine how Simmons's counsel's performance was deficient. Rather than assert an argument that

⁹ In Washington, the definition of "substantial bodily harm" explicitly includes injury "which causes a fracture of any bodily part." RCW 9A.04.110(b).

was bound to fail, Simmons's counsel chose to focus his attack on the comparability of Simmons's Illinois robbery conviction. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (appellants cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance). Such representation does not fall below an objective standard of reasonableness.

- b. Simmons's Sixth Amendment right to counsel was not violated because (1) his pre-sentence investigation did not constitute a critical stage; (2) his statements involve a previous conviction; and (3) the facts surrounding Simmons's pre-sentence investigation are unknown.

A defendant's Sixth Amendment right to counsel attaches when the State initiates adversarial proceedings against a defendant. See, e.g., Brewer v. Williams, 430 U.S. 387, 401, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). "After the right has attached, a government agent may not interrogate a defendant and use incriminating statements the defendant made in the absence of or without waiver of counsel." State v. Everybodytalksabout, 161 Wn.2d 702, 707, 166 P.3d 693 (2007)(citing Williams, 430 U.S. at 401-404).

A defendant's right to assistance "applies to every 'critical stage' of the proceedings." Everybodytalksabout, 161 Wn.2d at

708 (quoting State v. Tinkham, 74 Wn. App. 102, 109, 871 P.2d 1127 (1994)). While “Courts apply the “deliberately elicited” standard in determining whether a government agent has violated a defendant’s Sixth Amendment right to assistance of counsel,” Everybodytalksabout, 161 Wn.2d at 708 (quoting Fellers v. U.S., 540 U.S. 519, 524, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004)), the Sixth Amendment is not violated ““whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached,”” Everybodytalksabout, 161 Wn.2d at 708 (Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985)).

The defendant in Everybodytalksabout was convicted of first and second degree murder in July 1997; and on July 29, 1997, the trial court ordered a pre-sentence investigation report. Id. at 705. Without the knowledge or consent of his attorney, the defendant was interviewed by a Department of Corrections (DOC) officer. Id. at 706. After asking some preliminary questions, the DOC officer invited the defendant to talk about his offense: the defendant replied that he only assisted in the robbery, that he did not murder the victim, and that he did not want to discuss it further. Id.

Complying with the defendant's request, the DOC officer ended her interview. Id.

The defendant's conviction was eventually reversed on other grounds, State v. Everybodytalksabout, 145 Wn.2d 456, 481, 39 P.3d 294 (2002), and on remand the DOC officer testified about the defendant's statements in her pre-sentence investigation, Everybodytalksabout, 161 Wn.2d at 707. The State obtained another conviction, but the Supreme Court again reversed—holding that the defendant's Sixth Amendment right to counsel was violated. Id. at 714. Everybodytalksabout reasoned that:

- (1) The pre-sentence interview was a critical stage of the proceeding because the defendant's statements were used for the adversarial purpose of convicting him in a subsequent trial, id. at 712; and
- (2) The DOC officer deliberately elicited the defendant's incriminating statements because she stimulated conversations about the crime for which the defendant was charged and convicted, id. at 713.

This case differs from Everybodytalksabout on several levels. First, the State did not use Simmons's statements regarding his Illinois aggravated battery conviction for purposes of a later prosecution—Simmons's Sixth Amendment right to counsel was therefore not violated because his pre-sentence investigation was not a "critical stage." Id. at 710 (citing U.S. v. Jackson, 886 F.2d

838, 844 (7th Cir. 1989) (the defendant's statements to a probation officer are markedly unlike the prosecutor's adversarial use of a defendant's pretrial statement); Baumann v. U.S., 692 F.2d 565, 578 (9th Cir. 1982) (the State need not advise the accused of his right to counsel before a routine pre-sentence investigation with a probation officer in a noncapital case)).

Second, the DOC officer in Everybodytalksabout elicited testimony about the crime for which the defendant was charged and convicted. Id. at 713. But in this case, Simmons is challenging statements he made to a DOC officer in 2009 about an Illinois crime he pled guilty to in 2005. Simmons's claim is completely distinguishable from the defendant's claim in Everybodytalksabout. Id.

Finally, even if Simmons's Sixth Amendment right did attach to his pre-sentence investigation, there is no evidence that Simmons's counsel was not at Simmons's pre-sentence investigation, that Simmons's counsel did not tell Simmons to not discuss his criminal history with the DOC officer, or that Simmons was not read his Miranda rights. See, e.g., Everybodytalksabout, 161 Wn.2d at 708 (quoting Moulton, 474 U.S. at 176)(the Sixth

Amendment is not violated when a defendant voluntarily discloses facts to the State.).

Simmons claims that his trial counsel's performance was deficient because he "unreasonably allowed Mr. Simmons to participate in a presentence interview by DOC without a lawyer present, and failed to object to the use of statements at sentencing." Appellant's Brief at 12. But Simmons does not cite any controlling authority to support his claim that he was entitled to counsel at his pre-sentence investigation. Because Simmons's pre-sentence interview was not a critical stage and because he is attacking statements he made about a previous conviction, his counsel's failure to attend (if that is in fact what happened) or to object to Simmons's statements cannot constitute deficient performance.

- c. Even if Simmons's counsel's performance was deficient, Simmons cannot show prejudice because regardless of Simmons's pre-sentence investigation, his Illinois aggravated battery conviction is comparable to Washington's offense of second degree assault.

To meet the requirement of the second prong, appellants must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Thomas, 109 Wn.2d at 226 (emphasis removed)(quoting Strickland, 466 U.S. at 694).

Appellant courts are not required to address both prongs of the test if the appellant makes an insufficient showing on either prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986)(*superseded by statute on other grounds*). Courts may therefore dispose of an appellant’s ineffectiveness claim on the ground of lack of sufficient prejudice if they prefer. Strickland, 466 U.S. at 697.

Simmons cannot show prejudice in this case because his counsel’s performance was not deficient. But even if Simmons’s counsel had (1) not conceded that Simmons’s Illinois aggravated battery conviction is comparable to Washington’s offense of second degree assault, CP 112; RP 4, 6, or (2) been present at Simmons’s pre-sentence investigation, the two offenses’ are still both legally and factually¹⁰ comparable. Simmons did not receive ineffective assistance of counsel.

¹⁰ Even if the sentencing court could not consider the statements Simmons made in his pre-sentence investigation, it could still consider the facts surrounding Simmons’s 2005 guilty plea as admitted because of Caplinger, 514 N.E.2d at

3. If this court does consider Simmons's appeal, the trial court's finding that Simmons has the present or future ability to pay LFOs was not clearly erroneous because he was employed at the time of his arrest and because he recently received his high school diploma.

Courts do not require formal findings of fact about a defendant's present or future ability to pay LFOs, see, e.g., State v. Curry, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991) (no finding required to impose \$168 in court costs and a \$70 victim penalty assessment), but—instead—“review whether “the trial court judge took into account the financial resources of the defendant and the nature of the burden” imposed by LFOs under the clearly erroneous standard,” State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011)(quoting State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991)). Additionally, 9.94A.530(2) allows trial courts to consider information in pre-sentence reports at sentencing as “acknowledged” if the defendant does not object (briefed above at page 12).

In Bertrand, the trial court found that the defendant had the ability, or likely would have the ability in the future, to pay LFOs. Id. at 398. But the Court of Appeals disagreed, stating that “the record

1224, and because Simmons did not object to his criminal history at sentencing. See Releford, 148 Wn. App. at 483; RCW 9.94A.530(2); Southerland, 43 Wn. App. at 250 (briefed above at pages 17-18).

does not support the trial court's finding that [the defendant] has or will have the ability to pay these LFOs. . . ." Id. at 403. To support its conclusion, Bertrand emphasized that not only is the defendant disabled—but that the State failed to produce any evidence that indicated the defendant could repay LFOs. Id. at 404.

The Baldwin court, however, held that the trial court's imposition of LFOs did not constitute error or an abuse of discretion. Id. at 312. There, the pre-sentence report stated that "Mr. Baldwin describes himself as employable," and concluded that he should be held accountable for LFOs normally associated with his offense. Id. at 311. Baldwin noted that the defendant did not object to the pre-sentence report at sentencing, and that "when the presentence report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied." Id. at 311.

Simmons claims that "[t]he sentencing court's finding regarding Mr. Simmons's present or future ability to pay his legal financial obligations is not supported by the record." Appellant's Brief at 15. But unlike Bertrand, the pre-sentence report in this case indicated that Simmons is employable, as he had been working at a Taco Bell restaurant for two months at the time of his

arrest. CP 101. While the report acknowledged that Simmons's employment history is not extensive and that "his financial situation is "not good,"" it also stated that he does not have any credit card or auto loan debts. Id.¹¹

And like Baldwin, this information is considered "acknowledged" because Simmons did not object. 9.94A.530(2). Simmons's counsel also stated at re-sentencing that Simmons recently received his high school diploma, that he completed a bookkeeping program, and that Simmons plans to further his education. RP 7.

Given these facts, it is apparent that the sentencing court's finding that Simmons has the ability or likely future ability to pay \$600 in court costs—which is the minimum amount the Court can order—was not clearly erroneous. Id. at 14.

D. CONCLUSION.

Simmons's arguments cannot be considered because the trial court did not address them on remand. But even if his arguments are considered, Simmons has failed to show that his counsel's performance was ineffective because (1) Simmons's

¹¹ Additionally, Simmons is still very young: at the time of the State's brief, he is just 26 years old. See the date of birth listed for Simmons on his First Amended Felony Judgment and Sentence. State's CP 1.

Illinois aggravated battery conviction is comparable to Washington's offense of second degree assault, and (2) Simmons's Sixth Amendment right to counsel was not violated. Additionally, Simmons did not show that the trial court's finding that he has the present or future ability to pay LFOs was clearly erroneous.

The State respectfully asks this court to affirm Simmons's conviction.

Respectfully submitted this 12th day of March, 2012.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on the date below as follows:

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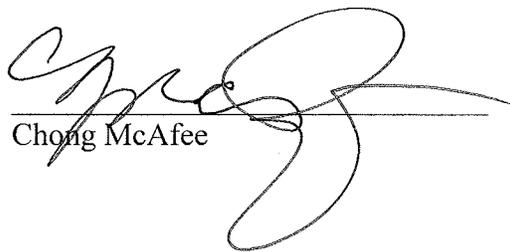
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--AND TO--

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of March, 2012, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

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