

**FILED**

APR 17, 2013

Court of Appeals  
Division III  
State of Washington

No. 31200-3-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

DENNIS L. SPROUL,  
Defendant/Appellant.

APPEAL FROM THE DOUGLAS COUNTY SUPERIOR COURT  
Honorable John Hotchkiss, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in including two prior Montana convictions for "felony theft" offenses in the defendant's offender score, where the State did not prove the convictions were comparable to a Washington felony.

2. The trial court erred in not conducting a comparability analysis on the record.

3. The record does not support the implied finding that the defendant has the current or future ability to pay Legal Financial Obligations.

*Issues Pertaining to Assignments of Error*

1. Whether the State failed to prove Mr. Sproul's prior Montana convictions for "felony theft" were each comparable to a Washington felony, where the Montana statute criminalizes more conduct than the corresponding Washington statute, and the State did not prove Mr. Sproul committed the narrower offense.

2. Whether Mr. Sproul was denied due process where the court included the two prior Montana "felony theft" convictions as criminal history without a comparability analysis to determine whether the convictions were legally or factually comparable to a Washington felony?

3. Should the implied finding that the defendant has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

**B. STATEMENT OF THE CASE**

Dennis L. Sproul, the defendant, was charged and convicted by a jury of one count of second degree burglary. CP 5–6, 62. At sentencing, the State asserted Mr. Sproul’s criminal history included two prior convictions from Montana, for “felony theft”. 10/8/12 RP 145; CP 87–90. The State argued the convictions were comparable to felony theft in Washington and should be included in the offender score. Id.

To support its position regarding Mr. Sproul’s criminal history, the State submitted a certified copy of a Judgment from Powell County, Montana. CP 91–94. According to the document, Mr. Sproul was sentenced on January 26, 2006, with respect to “his admission and plea of guilty” to two counts of felony theft. Id. The State claimed that the felony theft convictions compared to Washington's offense of theft in the second degree, a Class C felony. CP 89.

The criminal history shown in Mr. Sproul’s current Judgment and Sentence instead lists only two “felony theft” convictions from Powell

County, Montana, with a sentencing date of July 21, 2005 and an August 3, 2004 date of commission of the crimes. CP 97.

At sentencing, defense counsel stated “There are two additional theft charges in Montana and also would be here. Each of those would count a point. . . . Under my rendition of it, [Mr. Sproul] would [have an offender score of] five.” 10/8/12 RP 145. The State responded, “And that is what the state would have as well, your Honor. Those same convictions, and an offender score of five . . . . [THE COURT]” Is that the standard range you get, [defense counsel]? [DEFENSE COUNSEL]: Yes.” 10/8/12 RP 145. The trial court concluded:

The court has also reviewed the sentencing memorandum of the state, and the criminal history in this particular matter, [and] would find that Mr. Sproul – would agree with the state’s sentencing memorandum as to these thefts in Montana, that they count as [] thefts in Washington – [as] Class C. felonies. And the court would find that Mr. Sproul [has an offender score of] five.

10/8/12 RP 148.

The court included the two Montana convictions in the offender score of 5, and imposed a standard range sentence based upon that offender score. Id.; CP 97. The court made no record as to whether the Montana “felony theft” convictions were comparable to any Washington offense. Defense counsel did not object to the Court not conducting a comparability analysis to determine whether both of the Montana

convictions were comparable to any Washington felony. 10/8/12 RP 144–51.

The court also ordered a total amount of Legal Financial Obligations (“LFOs”) of \$1,950. CP 100–01. The court made no express finding that Mr. Sproul had the present or future ability to pay the LFOs. 10/8/12 RP 144–51; *see* CP 98 at ¶ 2.5. However, the Judgment and Sentence contained the following pertinent language by the court:

**¶ 2.5 Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 98. The court made no inquiry into Mr. Sproul’s financial resources and the nature of the burden that payment of LFOs would impose. 10/8/12 RP 144–51. The court ordered that Mr. Sproul begin making monthly payments on the LFOs commencing immediately and in an amount not less than \$25 per month.. CP 101 at ¶ 4.3.

This appeal followed. CP 108–09.

**C. ARGUMENT**

**1. The trial court erred in including the two prior Montana convictions for “felony theft” offenses in Mr. Sproul’s offender score without a comparability analysis, where the State did not prove each one was comparable to felony theft in Washington.**

a. Improper inclusion of out-of-state convictions may be challenged for the first time on appeal. Illegal or erroneous sentences, including the improper inclusion of out-of-state convictions, may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 484–85, 973 P.2d 452 (1999). A sentencing court’s calculation of an offender score is reviewed de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.2d 816 (2007).

b. A sentencing court may not include a prior out-of-state conviction in a person's offender score unless the State proves the offense is comparable to a Washington felony. A defendant's offender score establishes the range a sentencing court may use in determining the sentence. RCW 9.94A.530. The court calculates the offender score based upon its findings of the defendant's criminal history, which is a list of the defendant's prior convictions. RCW 9.94A.030(14); RCW 9.94A.525.

With limited exceptions,<sup>1</sup> the offender score includes only prior convictions for felony offenses. RCW 9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994).

Where the prior convictions are from another state, the SRA requires the court to translate the convictions "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The Washington Supreme Court has adopted a two-part test to determine whether an out-of-state conviction may be included in the offender score. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the court compares the legal elements of the out-of-state crime with the comparable Washington felony offense. More specifically, the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed. Morley, 134 Wn.2d at 606. If the elements are comparable, the out-of-state conviction is equivalent to a Washington felony and may be included in the offender score. Lavery, 154 Wn.2d at 254. But where the elements of the out-of-state crime are different or broader, the

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<sup>1</sup> Where the current conviction is for a felony traffic or watercraft offense, the SRA authorizes the court to include serious misdemeanor traffic or watercraft offenses in the offender score. *See* RCW 9.94A.525(11), (12).

sentencing court must examine the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255.

The State bears the burden of proving the existence and comparability of the out-of-state offense, by a preponderance of the evidence. Ford, 137 Wn.2d at 479–80; *see* State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). “Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” Ford, 137 Wn.2d at 481.

c. The State failed to establish a sufficient record for a comparability analysis. Here, in support of its position regarding Mr. Sproul’s criminal history, the State submitted a certified copy of a Judgment from Powell County, Montana. CP 91–94. According to the document, Mr. Sproul was sentenced on January 26, 2006, with respect to “his admission and plea of guilty” to two counts of felony theft. Id. The State claimed that the felony theft convictions compared to Washington's

offense of theft in the second degree, a Class C felony. CP 89. The Judgment does not reveal the date(s) of commission of the two offenses, which is the relevant inquiry for a comparability analysis. Morley, 134 Wn.2d at 606.

The criminal history shown in Mr. Sproul's current Judgment and Sentence does not reference the 2006 Judgment. Instead, it lists only two "felony theft" convictions from Powell County, Montana, with a sentencing date of July 21, 2005 and an August 3, 2004 date of commission of crime. CP 97. As shown below, the 2004 Montana offenses are not legally comparable to felony theft in Washington. Furthermore, regardless whether the 2006 Montana Judgment or the two felony thefts identified in the Judgment and Sentence with 2004 offense dates are considered, the record is insufficient to support any attempt at factual comparison.

d. The Montana crime of felony theft is not legally comparable to felony theft in Washington. The relevant inquiry is whether the elements of the 2004 Montana offenses are comparable to the elements of Washington's felony theft statute in effect at the time of the offense. Morley, 134 Wn.2d at 605. "If the elements of the foreign offense are broader than the Washington counterpart," that is, if the out-of-state statute

criminalizes more conduct than the comparable Washington statute, the elements are not legally comparable. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); Morley, 134 Wn.2d at 606. Put another way, if the court can conceive of a situation in which a defendant could commit the foreign crime without committing the Washington crime, the crimes are not legally comparable. State v. Jackson, 129 Wn. App. 95, 107-09, 117 P.3d 1182 (2005).

A comparison of the 2004 statutes from Washington and Montana shows that the Montana statute criminalized more conduct than the comparable Washington statute. In 2004, the Montana Code Annotated (MCA) at 45-2-101(22) defined “felony” as “an offense in which the sentence imposed upon conviction is death or imprisonment in a state prison for a term exceeding 1 year.” MCA 45-6-301 (2004) defined “theft” as follows:

**45-6-301. Theft**

(1) A person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over property of the owner and:

- (a) has the purpose of depriving the owner of the property;
- (b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
- (c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(2) A person commits the offense of theft when the person purposely or knowingly obtains by threat or deception control over property of the owner and:

- (a) has the purpose of depriving the owner of the property;
- (b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
- (c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(3) A person commits the offense of theft when the person purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another and:

- (a) has the purpose of depriving the owner of the property;
- (b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
- (c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(4) A person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over any part of any public assistance provided under Title 52 or 53 by a state or county agency, regardless of the original source of assistance, by means of:

- (a) a knowingly false statement, representation, or impersonation; or
- (b) a fraudulent scheme or device.

(5) A person commits the offense of theft when the person purposely or knowingly obtains or exerts or helps another obtain or exert unauthorized control over any part of any benefits provided under Title 39, chapter 71 or 72, by means of:

- (a) a knowingly false statement, representation, or impersonation; or
- (b) deception or other fraudulent action.

(6) (a) A person commits the offense of theft when the person purposely or knowingly commits insurance fraud as provided in 33-1-1202 or 33-1-1302; or

- (b) purposely or knowingly diverts or misappropriates insurance premiums as provided in 33-17-1102.

(7) A person commits the offense of theft of property by embezzlement when, with the purpose to deprive the owner of the property, the person:

(a) purposely or knowingly obtains or exerts unauthorized control over property of the person's employer or over property entrusted to the person; or

(b) purposely or knowingly obtains by deception control over property of the person's employer or over property entrusted to the person.

(8) (a) A person convicted of the offense of theft of property not exceeding \$1,000 in value shall be fined an amount not to exceed \$1,000 or be imprisoned in the county jail for a term not to exceed 6 months, or both. A person convicted of a second offense shall be fined \$1,000 or be imprisoned in the county jail for a term not to exceed 6 months, or both. A person convicted of a third or subsequent offense shall be fined \$1,000 and be imprisoned in the county jail for a term of not less than 30 days or more than 6 months.

(b) Except as provided in subsection (8)(c), a person convicted of the offense of theft of property exceeding \$1,000 in value or theft of any commonly domesticated hoofed animal shall be fined an amount not to exceed \$50,000 or be imprisoned in a state prison for a term not to exceed 10 years, or both.

(c) A person convicted of the offense of theft of property exceeding \$10,000 in value by embezzlement shall be imprisoned in a state prison for a term of not less than 1 year or more than 10 years and may be fined an amount not to exceed \$50,000. The court may, in its discretion, place the person on probation with the requirement that restitution be made under terms set by the court. If the terms are not met, the required prison term may be ordered.

(9) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

As noted, Montana “felony theft” is thus defined under MCA 46-6-301(8)(b) (2004), which provides:

(b) Except as provided in subsection (8)(c), a person convicted of the offense of theft of property exceeding \$1,000 in value or theft of any commonly domesticated hoofed animal shall be fined an amount not to exceed \$50,000 or be imprisoned in a state prison for a term not to exceed 10 years, or both.

Montana felony theft consequently includes the theft of property exceeding \$1,000 in value or theft of “any commonly domesticated hoofed animal” regardless of value. *See State v. Feeley*, 170 Mont. 227, 231–33, 552 P.2d 66 (1976).

Here, the State claims the Montana felony thefts are comparable to second degree thefts in Washington. In 2004, Washington’s second degree theft included the theft of property valued greater than \$250 but equal to or less than \$1,000.<sup>2</sup> Since a 2004 Montana felony theft necessarily means the property stolen was valued at more than \$1,000 (or a

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<sup>2</sup> RCW 9A.56.040 (2004) provides as follows:

Theft in the second degree—Other than firearm

(1) A person is guilty of theft in the second degree if he or she commits theft of:

- (a) Property or services which exceed(s) two hundred and fifty dollars in value other than a firearm as defined in RCW 9.41.010, but does not exceed one thousand five hundred dollars in value; or
  - (b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or
  - (c) An access device; or
  - (d) A motor vehicle, of a value less than one thousand five hundred dollars.
- (2) Theft in the second degree is a class C felony.

“commonly domesticated hoofed animal” regardless of value), it could not be comparable to a second degree theft in Washington in 2004.

Furthermore, in 2004 Washington had its own “theft of livestock” provisions. RCW 9A.56.080, Theft of livestock in the first degree (*Effective July 1, 2004*), provided as follows:

- (1) Every person who, with intent to sell or exchange and to deprive or defraud the lawful owner thereof, willfully takes, leads, or transports away, conceals, withholds, slaughters, or otherwise appropriates any horse, mule, cow, heifer, bull, steer, swine, or sheep is guilty of theft of livestock in the first degree.
- (2) Theft of livestock in the first degree is a class B felony.

RCW 9A.56.083, Theft of livestock in the second degree (*Effective July 1, 2003*), provided as follows:

- (1) A person who commits what would otherwise be theft of livestock in the first degree but without intent to sell or exchange, and for the person's own use only, is guilty of theft of livestock in the second degree.
- (2) Theft of livestock in the second degree is a class C felony.

Under these two “theft of livestock” provisions, it is possible that an offender’s conduct does not rise to the level of second degree theft of livestock, in which case the offender would only be guilty of a gross misdemeanor or misdemeanor. Neither would qualify as a “felony theft”

under Montana law.<sup>3</sup> Assuming a “commonly designated hoofed animal” is “livestock” under Washington law, theft of such animals is apparently always a felony in Montana. Montana’s felony theft statute criminalizes more conduct than the comparable Washington statutes, and the elements are not legally comparable. Thiefault, 160 Wn.2d at 415; Morley, 134 Wn.2d at 606.

e. The State did not prove each of the Montana convictions was factually comparable to felony theft in Washington. Where a foreign conviction is not legally comparable to a Washington felony, the sentencing court may look at the record to assess whether the underlying conduct would have violated the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The court may examine only those documents that show conclusively that the facts necessary to establish comparability were proved to a jury or admitted by the defendant

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<sup>3</sup> RCW 9A.20.021 (2004), Maximum sentences for crimes committed July 1, 1984, and after, provides in pertinent part as follows:

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

*Compare* with MCA 45-2-101(22) (2004), *supra*.

in the course of a guilty plea. *Lavery*, 154 Wn.2d at 258. The mere fact of the prior conviction is not sufficient to make this showing. *Id.*

If the State fails to establish a sufficient record, then the sentencing court lacks the necessary evidence to determine if the out-of-state convictions should be included in the offender score. *Ford*, 137 Wn.2d at 480–81. If the State provides sufficient evidence, the sentencing court must conduct the comparison on the record. *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005).

Here, to support its argument that Mr. Sproul’s Montana convictions for “felony theft” were comparable to Washington felony theft, the State submitted a January 2006 Judgment. CP 91–94. The document shows only that Mr. Sproul pled guilty to two counts of felony theft, was sentenced to concurrent terms of five years imprisonment and ordered to pay \$1,000 in restitution. No Montana criminal statutes are specified as the basis for either offense. More importantly, the document reveals no factual basis for each of the convictions. There is similarly nothing in the record to establish the factual basis for the two Montana offenses listed as criminal history in the Judgment and Sentence. From either of these two sources, there is insufficient information to make any factual comparison of the offenses.

The State therefore did not prove the offenses were comparable to a Washington felony and the trial court erred in including the offense in Mr. Sproul's offender score. The State failed to establish a sufficient record for use by the trial court in determining the proper classification(s) of the out-of-state convictions. The court accepted the offender score without conducting a comparability analysis of the offenses on the record. These errors require remand. Labarbera, 128 Wn. App. at 350.

f. Mr. Sproul must be resentenced. Where a sentence is erroneous due to the miscalculation of the offender score, the defendant is entitled to be resentenced. Ford, 137 Wn.2d at 485. That is the remedy here.

**2. The implied finding that Mr. Sproul has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.**

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.”<sup>4</sup> RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

b. There is insufficient evidence to support the trial court's implied finding that Mr. Sproul has the present and future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916.

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<sup>4</sup> It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. See RCW 13.40.192.

Curry recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, the court considered Mr. Sproul's "present and future ability to pay legal financial obligations" but made no express finding that he had the present or likely future ability to pay those LFOs. However, the finding is implied because the court ordered that all payments on the LFOs be paid "commencing immediately" and in the amount of not less than \$25 per month *after* it considered "the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." CP 98 at ¶ 2.5; CP 101 at ¶ 4.3.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to 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.’ ” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Sproul's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding in ¶¶ 2.5 and 4.3 that Mr. Sproul has the present or future ability to pay LFOs. The record instead supports the opposite conclusion: the trial court found Mr. Sproul indigent<sup>5</sup> for purposes of pursuing this appeal. The implied finding that he has the present or future ability to pay LFOs that is implicit in the directive to make payments commencing immediately and at a rate of no less than \$25.00 per month is simply not supported in the record. It is clearly erroneous and the directive must be

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<sup>5</sup> SCOMIS sub no. 59, filed 10/18/12, Order of Indigency.

stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court's finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOS of any nature must be stricken where the court made no inquiry and there is no evidence in the record to support such findings.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of "fixing" it with the taking of new evidence. *Cf.* State v. Souza (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of

the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

Mr. Sproul is not challenging *imposition* of the LFOs; rather, the trial court made the implied finding that he has the present and future ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Sproul until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ ‘[t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’ ” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn.

App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

**D. CONCLUSION**

For the reasons stated, the matter should be remanded for resentencing.

Respectfully submitted on April 17, 2013.

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s/Susan Marie Gasch, WSBA #16485

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 17, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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