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SUPREME COURT NO. _____

COA NO. 39570-7-III Case #: 1034661

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SREGZINSKI,

Petitioner.

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

The Honorable Brandon L. Johnson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Sregzinski is the petitioner.

B. COURT OF APPEALS DECISION

Sregzinski requests review of the decision in State v. Robert Gage Sregzinski, Court of Appeals No. 39570-7-III (slip op. filed August 15, 2024).

C. ISSUES PRESENTED FOR REVIEW

1. The offender score includes four Oregon convictions. Is the sentence unlawful because the State did not prove these Oregon offenses are legally or factually comparable to a Washington felony?

2. Did Sregzinski waive his challenge to the inclusion of Oregon convictions in his offender score, where the record does not establish that Sregzinski affirmatively agreed the prior convictions were comparable to a Washington offense?

3. Alternatively, did counsel provide ineffective assistance in affirmatively agreeing to the inclusion of the Oregon convictions in the offender score?

4. Where Sregzinski appeared remotely for the resentencing hearing, must the case be remanded for a new sentencing hearing because the court violated Sregzinski's constitutional right to privately confer with his attorney at this critical stage of the proceeding?

D. STATEMENT OF THE CASE

Robert Sregzinski pleaded guilty to first degree manslaughter and second degree assault. CP 13-25; RP¹ (5/5/19) 8-9. The court imposed a total of 280 months in confinement, to run consecutive to the sentence imposed in a previous Oregon case. CP 30; RP (7/31/19) 29.

¹ The verbatim report of proceedings from the first appeal under 37043-7-III consists of 5/5/19, 7/15/19, and 7/31/19 and is cited as follows: RP (date of hearing) (page number).

Sregzinski appealed. CP 42. The Court of Appeals remanded for resentencing because of an offender score error pursuant to State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). State v. Sregzinski, 17 Wn. App. 2d 1050, 2021 WL 1931520, at *2-3 (2021).

A resentencing hearing took place on remand. RP² 3-18. Sregzinski, who was being held in an Oregon prison, remotely attended the hearing by means of the WebEx computer application. CP 121-22.

Defense counsel requested 210 months in confinement, which she described as the "low end." RP 9-10. The State surveyed Sregzinski's criminal history, including the prior Oregon offenses of attempted murder and "three counts of unlawful use of a firearm." RP 10. The State asked for 280 months, the top of the standard range. RP 12.

² Citation to the verbatim report of proceedings for the resentencing hearing on 2/7/23 is: RP (page number).

The court noted its "re-sentencing mandate," observing "there is no change to the standard range sentence with the new offender score of nine. So on Count 1 the standard range is 210 to 280 months." RP 15. The court did not "see a basis to alter the sentence" and imposed a total of 280 months of confinement. RP 15.

On appeal from resentencing, Sregzinski argued he should be resentenced because (1) the trial court violated his constitutional right to privately confer with his attorney at the sentencing hearing; (2) the offender score included incomparable Oregon offenses; and (3) counsel was ineffective in agreeing to the inclusion of those offense in the offender score.

The Court of Appeals held "Sregzinski affirmatively acknowledged the existence and comparability of his Oregon convictions, thus relieving the State of its obligation to prove these." Slip op. at 2. The Court of Appeals declined to consider "whether his attorney was

ineffective because we cannot conduct a comparability analysis on this record." Slip op. at 2. While the Court of Appeals agreed that the failure to ensure that Sregzinski could confer privately with his attorney at sentencing was manifest constitutional error, it concluded the error was harmless. Slip op. at 2.

E. WHY REVIEW SHOULD BE ACCEPTED

- 1. The trial court erred in calculating the offender score because the State failed to prove Oregon convictions are comparable to a Washington felony.**

The State did not prove the comparability of four Oregon convictions for purposes of calculating the offender score. The offender score is incorrect. Sregzinski did not affirmatively acknowledge the Oregon offenses were comparable to a Washington offense. The case must be remanded for resentencing. Sregzinski seeks review under RAP 13.4(b)(3) and (4).

a. The State did not prove the Oregon "attempted murder" conviction is legally or factually comparable.

In computing the offender score, "[o]ut-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 State bears the burden of providing sufficient evidence to prove by a preponderance of the evidence that a foreign offense is comparable to a Washington offense." State v. Latham, 183 Wn. App. 390, 398, 335 P.3d 960 (2014). "If an out-of-state conviction involves an offense that is neither legally nor factually comparable to a Washington offense, the sentencing court may not include that conviction in the defendant's offender score." State v. Howard, 15 Wn. App. 2d 725, 732, 476 P.3d 1087 (2020), review denied, 197 Wn.2d 1006, 483 P.3d 783 (2021).

The first step is to determine whether the foreign offense is legally comparable. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). Offenses are not legally comparable if the Washington statute defines an offense more narrowly than the foreign statute. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005).

The "criminal history" section of the judgment and sentence, as well as the "plea agreement to criminal history," lists an Oregon conviction for "attempted murder w/ firearm." CP 24, 88. "Attempt" is defined more narrowly in Washington than in Oregon. State v. Arndt, 179 Wn. App. 373, 382, 320 P.3d 104 (2014); accord Howard, 15 Wn. App. 2d at 732-33. "The difference is that Washington requires specific intent to commit a crime rather than general intent to engage in conduct constituting a substantial step towards commission of a crime." Arndt, 179 Wn. App. at 382 (comparing ORS

161.405(1) with RCW 9A.28.020(1)). For this reason, the Oregon offense of attempted murder is not legally comparable to the Washington offense of attempted murder.

If offenses are not legally comparable, it must be determined whether the offenses are factually comparable. Thiefault, 160 Wn.2d at 415. In assessing factual comparability, the court may look at the facts underlying the prior conviction to determine if the defendant's conduct would have resulted in a conviction in Washington. Lavery, 154 Wn.2d at 255.

The State did not prove factual comparability. The State submitted no judgment and no plea statement, nor any other court record from the Oregon case. The description of the incident in the DOC pre-sentence investigation report (CP 109) cannot be relied on to establish factual comparability in light of the Sixth Amendment right to a jury trial, as Sregzinski did not

admit or stipulate to any fact associated with the incident, and no fact connected with that incident was proved beyond a reasonable doubt. Thieffault, 160 Wn.2d at 415.

b. The State did not prove the Oregon "unlawful use" convictions are legally or factually comparable.

The "criminal history" section of Sregzinski's judgment and sentence, as well as the "plea agreement to criminal history," lists three Oregon convictions for "unlawful use of firearm." CP 24, 88. There is an Oregon offense called "unlawful use of weapon." ORS 166.220. Assuming this is the offense at issue, there is no legal comparability to a Washington felony.

ORS 166.220 provides:

- (1) A person commits the crime of unlawful use of a weapon if the person:
 - (a) Attempts to use unlawfully against another, or carries or possesses with intent to use unlawfully against another, any dangerous or deadly weapon as defined in ORS 161.015; or
 - (b) Intentionally discharges a firearm, blowgun, bow and arrow, crossbow or explosive device within the city limits of any city or within

residential areas within urban growth boundaries at or in the direction of any person, building, structure or vehicle within the range of the weapon without having legal authority for such discharge.

The Oregon statute is divisible in that it contains alternate means of committing the crime, divided into subsections (1), (2) and (3). ORS 166.220. An out-of-state offense is not legally comparable when the Washington statute does not have the same alternative means as the out-of-state statute. In re Pers. Restraint of Canha, 189 Wn.2d 359, 371, 402 P.3d 266 (2017). There can be no legal comparability where, as here, the record does not show which subsection of the out-of-state statute applies to the conviction. State v. Bluford, 188 Wn.2d 298, 318-19, 393 P.3d 1219 (2017).

Assuming arguendo that ORS 166.220(1)(a) is at issue, the Washington offense of second degree assault is not legally comparable.

"A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . Assaults another with a deadly weapon[.]" RCW 9A.36.021(1)(c).

In Oregon, a person can be convicted of carrying or possessing a weapon "with intent to use [it] unlawfully against another" under ORS 166.220(1)(a) "even if the person did not actually use a weapon." State v. McAuliffe, 276 Or. App. 259, 263, 366 P.3d 1206 (Or. App. Ct. 2016).

The Washington statute, on the other hand, requires an assault with a deadly weapon; i.e. actual use upon a victim. RCW 9A.36.021(1)(c). Further, the "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). The Oregon statute does not require an intentional assault. ORS 166.220(1). The Oregon statute is legally broader.

The State did not prove factual comparability. The State submitted no judgment and no plea statement, nor any other court record from the Oregon case. The record does not even show which subsection of ORS 166.220 to which Sregzinski pled guilty.

The DOC pre-sentence investigation report describes the April 28, 2016 incident as follows: "Mr. Sregzinski was involved in an incident in Milton-Freewater where he shot at Police and he was struck in the leg when Police returned fire." CP 109. The description of the incident in the DOC pre-sentence investigation report (CP 109) cannot be relied on to establish factual comparability in light of the Sixth Amendment right to a jury trial, as Sregzinski did not admit or stipulate to any fact associated with the incident, and no fact connected with that incident was proved beyond a reasonable doubt. Thiefault, 160 Wn.2d at 415.

Where, as here, the sentencing court erred by failing to conduct a necessary comparability analysis and the record is insufficient to establish comparability, resentencing is required. State v. Ford, 137 Wn.2d 472, 485-86, 973 P.2d 452 (1999).

c. Sregzinski did not waive the offender score issue for appeal.

Defense counsel did not object to the offender score but "[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." Ford, 137 Wn.2d at 477 (reviewing comparability challenge raised for the first time on appeal).

Sregzinski did not waive the issue for appeal by agreeing to his criminal history. The statement of defendant on plea of guilty states lists an offender score of 9+. CP 14. The plea statement provides: "The prosecuting attorney's statement of my criminal history is

attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete." CP 14. The "plea agreement (felony) prosecutor's statement of defendant's criminal history," signed by Sregzinski and defense counsel, lists the "attempted murder with firearm" and "unlaw use/firearm" counts committed on April 28, 2016 in Umatilla County, as well as three Oregon convictions for "menacing" and assorted Washington priors. CP 24-25.

Defendants may waive the comparability requirement if they affirmatively acknowledge out-of-state convictions are properly included in the offender score. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

Sregzinski acknowledged the existence of the prior Oregon convictions in his plea through his statement of criminal history. CP 14, 24-25. Sregzinski did not, however, affirmatively acknowledge those prior

convictions were comparable to a Washington offense for purposes of their inclusion in the offender score.

Consider State v. Lucero, where defense counsel recited a standard range that was based on the inclusion of a California burglary conviction and conceded the offender score was at least 6 points, which included that conviction. State v. Lucero, 168 Wn.2d 785, 787, 230 P.3d 165 (2010). Counsel unsuccessfully argued a California conviction for possession of a controlled substance had washed out. Id. The trial court did not conduct a comparability analysis of the California convictions, and it imposed a standard range sentence based on an offender score of 7 points, which included the California convictions. Id.

The Court of Appeals held Lucero waived the issue for appeal because he affirmatively acknowledged the comparability of the California convictions when he acknowledged he would have an offender score that

necessarily included the California burglary conviction. Id. The Supreme Court reversed because Lucero did not "affirmatively acknowledge" that his California convictions were comparable to Washington crimes. Id. at 789.

Sregzinski's case is on the same footing. Defense counsel requested a sentence at the bottom of the standard range but neither the parties nor the court commented on how the Oregon convictions for attempted murder and "unlawful use," or any of the other convictions for that matter, factored into the offender score. Counsel did not affirmatively agree that the Oregon convictions for attempted murder and "unlawful use" were comparable to a Washington crime. The issue of comparability never came up.

Sregzinski's case contrasts with State v. Hickman, where the record showed the defendant knowingly and affirmatively agreed to the offender score of eight points and to his prior out-of-state convictions as part of his

guilty plea. State v. Hickman, 112 Wn. App. 187, 189-90, 48 P.3d 383 (2002), review granted, cause remanded, 148 Wn.2d 1014, 64 P.3d 650 (2003), adhered to on remand, 116 Wn. App. 902, 68 P.3d 1156 (2003). As part of the plea agreement, Hickman "stipulates that the following [out-of-state] convictions are equivalent to Washington State felony convictions of the class indicated," and "that the offender score is correct." Id. at 190. He "stipulated [to] 8 points." Id. at 190-91.

Nothing like that occurred in Sregzinski's case. Sregzinski agreed to his criminal history as part of the plea agreement. CP 24-25. Unlike in Hickman, he did not agree that the Oregon convictions were part of his offender score. The statement of criminal history makes no reference to the offender score.

The plea statement recites that "[t]he standard sentence range is based on the crime charged and my criminal history." CP 14. The agreed "criminal history,"

however, includes 17 prior convictions, only four of which comprise the Oregon convictions at issue on appeal. CP 24-25. The agreement makes no reference as to how any of those convictions might or might not factor into the score. CP 24-25.

Counsel acknowledged the Oregon convictions existed in recounting her discussion with her client, but counsel at no time stated the Oregon convictions were comparable to a Washington felony and thus properly included in the offender score. RP 9-10. Counsel stated "much of it is, you know, feels like a formality because he still has his offender score" and asked "for what we asked for at the original sentencing, which was the 210 months." RP 9-10. But counsel at no time expressed agreement with the offender score and never agreed any Oregon offense was comparable to a Washington offense. Compare State v. Faulkner, 25 Wn. App. 2d 1026, 2023

WL 413206, at *3 (2023) (unpublished)³ (in plea case involving agreed criminal history, no waiver where "All Mr. Faulkner did was acknowledge the existence of his prior convictions. This was not enough to establish his offender score. Mr. Faulkner never agreed his foreign convictions were comparable to Washington crimes."); State v. Reid, 12 Wn. App. 2d 1016, 2020 WL 638889, at *2-4 (2020) (unpublished) (court erred in including Oregon conviction in the offender score, where defendant in plea case stipulated to his criminal history, but did not stipulate to his offender score).

The Court of Appeals held: "By affirmatively admitting that his criminal history correctly included the Oregon convictions and acknowledging that his offender score was 9+ based on a criminal history that included his

³ GR 14.1(a) permits citation to unpublished authority, which has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

out-of-state convictions, Sregzinski affirmatively acknowledged the existence and comparability of his criminal history." Slip op. at 10.

There is no waiver in light of Lucero, which establishes that there is no affirmative agreement to comparability where defense counsel recites a standard range and offender score that is based on the inclusion of an out-of-state conviction later challenged on appeal as incomparable. Lucero, 168 Wn.2d at 787, 789. The record does not show Sregzinski affirmatively agreed that the four Oregon convictions at issue are comparable to a Washinton felony and contributed to the offender score. The offender score error is therefore not waived for appeal.

- d. Alternatively, defense counsel provided ineffective assistance in agreeing to the comparability of the Oregon offenses for the purpose of inclusion in the offender score.**

Every criminal defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

While any objection to an out-of-state conviction's inclusion may be waived by affirmative acknowledgement that it was properly included, it is ineffective assistance of counsel to make such an acknowledgment when the out-of-state conviction is not legally comparable and the State fails to prove factual comparability.

In Thiefault, the Supreme Court held defense counsel provided ineffective assistance of counsel by

failing to object to the sentencing court's erroneous determination that a Montana conviction was comparable. Thiefault, 160 Wn.2d at 412, 417. Counsel's failure to object was deficient because the Montana attempted robbery statute is broader than its Washington counterpart and the record contained insufficient documentation to establish the Montana conviction was factually comparable. Id. at 417. Counsel's deficient performance was prejudicial because "[a]lthough the State may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable[.]" Id.

As in Thiefault, the out-of-state statute under which Sregzinski was convicted is broader than its potential Washington counterparts so they are legally incomparable. Further, the record does not establish that

the Oregon offenses are factually comparable. Any agreement by Sregzinski's counsel that the Oregon convictions are comparable was therefore deficient performance.

That deficiency prejudiced the sentencing outcome. The record does not show the State will be able to prove factual comparability, which is sufficient to undermine confidence in the outcome. Thiefault, 160 Wn.2d at 417. The inclusion of the four Oregon convictions added five points to Sregzinski's offender score, significantly increasing his standard range. See CP 110-12; RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness level of XI for first degree manslaughter). The remedy is remand so that the trial court can conduct a factual comparability analysis of the Oregon convictions. Thiefault, 160 Wn.2d at 417.

The Court of Appeals declined to review Sregzinski's claim of ineffective assistance of counsel because the

record was "insufficient," stating "[b]ecause we cannot perform a comparability analysis on this record, we cannot determine whether counsel's performance was deficient or whether any deficiency resulted in prejudice." Slip op. at 12. This conflicts with Supreme Court and Court of Appeals precedent.

In Thiefault, this Court held counsel was deficient because the Montana attempted robbery statute is broader than its Washington counterpart and the record contained insufficient documentation to establish the Montana conviction was factually comparable. Thiefault, 160 Wn.2d at 417. There was prejudice because the record did not show the State would be able to prove factual comparability. Id.

In Thiefault, the lack of record to establish factual comparability supported the ineffective assistance claim. The Court of Appeals, turning Theifault upside down, used the lack of record supporting comparability to refuse

Sregzinski's ineffective assistance claim. The Court of Appeals decision conflicts with Thiefault, warranting review under RAP 13.4(b)(1).

The Court of Appeals decision also conflicts with State v. Davis, 3 Wn. App. 2d 763, 783-84, 418 P.3d 199, 210 (2018), warranting review under RAP 13.4(b)(2).

Citing Thiefault, Davis recognized "[t]he supreme court has held that failure to object to an improper comparability analysis is ineffective assistance of counsel" and "[p]rejudice is self-evident as it increases the defendant's offender score." Davis, 3 Wn. App. 2d at 783. "Thus, the only question is whether the trial court would have reached the same result if it had properly conducted the comparability analysis." Id. at 783-84. In Davis, "the State failed to prove that the California burglary convictions were either legally or factually comparable. Based on this deficient showing, the failure to object constituted ineffective assistance of counsel. The result altered Davis's

offender score and thus prejudiced him in sentencing." Id. at 784.

As in Davis, the only question in Sregzinski's case is whether the trial court would have reached the same result if it had properly conducted the comparability analysis. As the State failed to prove legal or factual comparability, and the Oregon offenses were used to increase his offender score, Sregzinski establishes both deficiency and prejudice from counsel's failure to object.

3. The court violated Sregzinski's right to privately confer with his attorney at a critical stage of the proceeding.

Sregzinski has the constitutional right to the assistance of counsel at all critical stages of the criminal proceedings. Montejo v. Louisiana, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009); State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009); U.S. Const. amend. VI; Wash. Const. art. 1, § 22. Sentencing

is a critical stage. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

The constitutional right to counsel "requires individuals charged with crimes to be able to confer privately with their attorneys at all critical stages of the proceedings." State v. Anderson, 19 Wn. App. 2d 556, 562-63, 497 P.3d 880 (2021), review denied, 199 Wn.2d 1004 (2022). "When videoconferencing is used, courts must take care to ensure criminally accused persons are able to confidentially confer with counsel throughout the proceedings." Id. at 558.

Sregzinski appeared remotely through the WebEx computer application from prison (CP 121-22), so "it is not apparent how private attorney-client communication could have taken place during the remote hearing." Anderson, 19 Wn. App. 2d at 563. As in Anderson, no ground rules were set for Sregzinski and his attorney to confidentially communicate in this setting. RP 3-18.

The Court of Appeals correctly observed the issue could be raised for the first time on appeal as a manifest constitutional error under RAP 2.5(a)(3). Slip op. at 14-17. "Here, there is nothing in the record indicating that Sregzinski could confer privately with his attorney during the resentencing, or knew that he had the option to do so." Slip op. at 14-15.

Constitutional errors are presumed prejudicial. Anderson, 19 Wn. App. 2d at 564. The prosecution bears the burden of establishing the error was harmless beyond a reasonable doubt. Id.

In Anderson, the prosecution met its burden of showing constitutionally harmless error because there was simply "no plausible basis for additional relief" and therefore attorney-client consultation could not have made any difference. Id. at 558, 564.

Unlike in Anderson, Sregzinski had a plausible issue beyond those addressed at resentencing. The State

did not prove the comparability of Oregon convictions, which affects the offender score and resulting standard range. The State cannot prove beyond a reasonable doubt that Sregzinski's attorney may have raised this argument and the court may have ruled in Sregzinski's favor had Sregzinski been allowed to privately consult with his attorney.

The Court of Appeals held the error was harmless because it was "speculative" that counsel may have raised the comparability argument had Sregzinski been able to privately consult during the resentencing hearing. Slip op. at 17. "There is nothing to show that a private conversation with Sregzinski during the hearing would have changed her analysis of the Oregon conviction." Slip op. at 18.

The Court of Appeals improperly flipped the burden of showing prejudice onto Sregzinski. There is nothing to show that a private conversation with Sregzinski during the hearing would *not* have changed counsel's analysis of the

Oregon conviction. It is the State's burden to prove otherwise beyond a reasonable doubt. See State v. Schlenker, __Wn. App. 2d__, 553 P.3d 712, 725 (2024) (the State, not defendant, possesses the burden to show lack of prejudice: "We cannot rule out a reasonable possibility that an opportunity for private consultation might have influenced Schlenker's decisions, his counsel's strategy, or otherwise impact the outcome of trial."); State v. Bragg, 28 Wn. App. 2d 497, 515, 536 P.3d 1176 (2023) (the State did not carry its burden to show harmless error where there was "a reasonable possibility" Bragg would have benefitted from a private conversation with counsel). Sregzinski seeks review under RAP 13.4(b)(3).

F. CONCLUSION

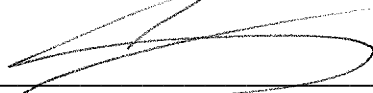
For the reasons stated, Sregzinski respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4240 words excluding those portions exempt under RAP 18.17.

DATED this 16th day of September 2024.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read 'Casey Grannis', is written over a horizontal line.

CASEY GRANNIS

WSBA No. 37301

Attorneys for Petitioner

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 39570-7-III
Respondent,)	
)	
v.)	
)	
ROBERT GAGE SREGZINSKI,)	UNPUBLISHED OPINION
)	
Appellant.)	

STAAB, J. — Robert Gage Sregzinski pleaded guilty to one count of first degree manslaughter and one count of second degree assault. At sentencing, the trial court imposed a high-end standard range sentence. Sregzinski appealed. We affirmed his conviction but remanded for resentencing following *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

At his resentencing hearing, Sregzinski appeared by video because the State of Oregon, where he was incarcerated, refused to extradite him to Washington for the hearing. Consistent with this court’s mandate, the trial court allowed Sregzinski’s counsel to argue for a lower sentence, but ultimately imposed the same 280-month sentence given that Sregzinski’s offender score had fallen to 9 and his standard sentencing range thus remained the same.

In this second appeal, Sregzinski argues that the State failed to prove the comparability of his out-of-state convictions, his attorney was ineffective for acknowledging the Oregon convictions, and the trial court violated his right to confer privately with his attorney when he appeared by video.

We affirm Sregzinski's sentence, but remand for the limited purpose of striking legal financial obligations (LFOs). We conclude that Sregzinski affirmatively acknowledged the existence and comparability of his Oregon convictions, thus relieving the State of its obligation to prove these. We decline to consider whether his attorney was ineffective because we cannot conduct a comparability analysis on this record. While we agree that the failure to ensure that Sregzinski could confer privately with his attorney at sentencing was manifest error, we conclude that the State has met its burden of showing the error was harmless beyond a reasonable doubt. Finally, we remand to strike (1) any requirement from the community custody conditions that Sregzinski participate in alcohol treatment, (2) any obligation for Sregzinski to cover the cost of such treatment, and (3) the victim penalty assessment (VPA).

BACKGROUND

In May 2019, Sregzinski pleaded guilty to one count of first degree manslaughter and one count of second degree assault. In a signed plea statement, he affirmed that his offender score was 9+ and acknowledged his standard range. Sregzinski also acknowledged that

[t]he standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.

...

The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete.

Clerk's Papers (CP) at 14.

Sregzinski did not attach a different statement. Thus, he "agree[d]" that the prosecution's statement of his criminal history was "correct and complete" for sentencing purposes. CP at 14.

Sregzinski's criminal history as recited by the State included the following prior crimes, their designation as felonies or misdemeanors, and associated offender score points, based on the sentencing statutes then in force as calculated in the presentence investigative report:

- Attempted murder, committed as an adult in 2016, in Umatilla County, Oregon. As a violent offense, this counted as 2 points.¹

¹ In Washington, attempted murder is a serious violent offense, which ordinarily results in 3 points toward an offender score for a serious violent offense like first degree manslaughter. *See* RCW 9.94A.030(46); former RCW 9.94A.525(9) (2017). It is not clear from the record why the State counted this as 2 points instead of 3. The State may have concluded Sregzinski's commission of attempted murder in Oregon was factually comparable to a "violent"—but not a "serious violent"—Washington felony.

- Three counts of unlawful use of a firearm, also committed in 2016 in Umatilla County. As nonviolent adult felonies, each counted as 1 point, for a total of 3 points.
- Second degree burglary, committed as a juvenile in 2015, in Walla Walla County. As a nonviolent juvenile felony, this conviction counted as one-half point.
- Residential burglary, committed in 2014, in Walla Walla County. As a nonviolent juvenile felony, this conviction counted as one-half point.
- Residential burglary, committed in 2014, in Walla Walla County. As a nonviolent juvenile felony, this conviction counted as one-half point.
- Possession of a stolen vehicle, committed in 2014, in Walla Walla County. As a nonviolent juvenile felony, this conviction counted as one-half point.
- Second degree possession of stolen property, committed in 2014, in Walla Walla County. As a nonviolent juvenile felony, this conviction counted as one-half point.
- Simple possession of a controlled substance,² committed in 2014, in Walla Walla County. As a nonviolent juvenile felony, this conviction counted as one-half point.

See CP at 24-25, 110-12; *see generally* former RCW 9.94A.525(9).

Sregzinski's offender score also includes points for the current felonies, which are treated as prior offenses when scoring other crimes for sentencing. *See* RCW 9.94A.525(1), .589(1)(a). Thus, because Sregzinski was being sentenced for another Walla Walla County felony—second degree assault—on the same day, that offense

counted against his offender score for first degree manslaughter. As a violent offense, the second degree assault conviction added an additional 2 points to Sregzinski's offender score. *See* RCW 9.94A.030(58); former RCW 9.94A.525(9).

In total, Sregzinski's offender score was 10 at his original sentencing. The trial court described it as "9+" in its written order. Sregzinski agreed that his offender score was "9+."

Sregzinski was sentenced in July 2019. The trial court adopted the parties' agreed statement of criminal history. The defense sought a low-end sentence of 210 months, while the State sought a high-end sentence of 280 months. The court agreed with the parties that Sregzinski's offender score exceeded 9, and imposed a 280-month sentence—the very top of the standard range.³

As to LFOs, the court found Sregzinski was indigent and imposed only the then-mandatory VPA. His confinement would be followed by 36 months of community custody, a condition of which was participation in an "inpatient or outpatient alcohol/drug program at his expense." CP at 30-31.

² We refer to this conviction as Sregzinski's "*Blake*" conviction.

³ The court imposed a standard-range sentence of 84 months for the second degree assault charge, to run concurrently with the 280-month sentence for first degree manslaughter. The court ordered Sregzinski to begin serving his Washington sentence once released from his ongoing confinement in Oregon for attempted murder and related crimes.

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Sregzinski appealed his convictions and sentence. He sought reversal of his convictions, arguing his guilty plea was invalid. *State v. Sregzinski*, No. 37043-7-III (Wash. Ct. App. May 29, 2020) (*Sregzinski I*). He also challenged components of his sentence, but did not raise any concerns about the calculation of his offender score in general, nor the comparability of his Oregon convictions.

While Sregzinski's appeal was pending, the Washington Supreme Court decided *Blake*, which held that our state's strict liability drug possession statute was unconstitutional. 197 Wn.2d 170. This court allowed the parties to provide supplemental briefing on *Blake*. See Letter from Renee S. Townsley, Clerk/Administrator, *Sregzinski I*, No. 37043-7-III (Wash. Ct. App. April 5, 2021).

Sregzinski had one prior conviction invalidated by *Blake*, which had counted as one-half point toward his offender score. Thus, *Blake* caused his offender score to fall from 10 to 9.5, and rounding down as required, to 9. See RCW 9.94A.525 ("The offender score is . . . rounded down to the nearest whole number."); see also CP at 51. Once an offender score reaches 9, the standard sentencing range maxes out. See RCW 9.94A.510.

In his supplemental brief, Sregzinski conceded his standard sentencing range would *not* change even with the vacatur of the *Blake* conviction. See Supp. Br. of Appellant at 11; *Sregzinski I*, No. 37043-7-III (Wash. Ct. App. Mar. 31, 2021). Nevertheless, he sought a full resentencing, claiming the error was not harmless. See *id.* In making this

argument, he relied on this court’s opinion in *State v. McCorkle*, 88 Wn. App. 485, 945 P.2d 736 (1997), *aff’d*, 137 Wn.2d 490, 973 P.2d 461 (1999). The State filed a supplemental response brief. It was a single page, stating simply that it “concedes the error stated in [Sregzinski’s] brief.” Supp. Br. of Resp’t at 1, *Sregzinski I*, No. 37043-7-III (Wash. Ct. App. May 4, 2021). We rejected Sregzinski’s challenge to his guilty plea but accepted the parties’ concessions without analysis and “remanded for resentencing.” CP at 49; *see Sregzinski I*, No. 37043-7-III, slip op. at 4-6 (Wash. Ct. App. May 13, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/370437_unp.pdf.

At the time, Sregzinski was incarcerated by the State of Oregon, which refused Governor Inslee’s request that Sregzinski be extradited to our state for resentencing. As a result, the trial court granted the State’s request that Sregzinski be allowed to appear via a videoconferencing platform at his resentencing hearing.

At the resentencing hearing, Sregzinski appeared via videoconference and told the court he wanted to “retract [his] plea.” RP (Feb. 7, 2023) at 6. The trial court responded it would not consider Sregzinski’s attack on the validity of his plea because this court had rejected those arguments and remanded only for resentencing.

Sregzinski’s counsel appeared in person. When the trial court turned to Sregzinski’s attorney,⁴ counsel conceded that the resentencing “feels like a formality

⁴ At resentencing, Sregzinski was represented by the same attorney who represented him at the initial sentencing.

because *he still has his offender score.*” Rep. of Proc. (RP) (Feb. 7, 2023) at 9 (emphasis added). She acknowledged that she had reviewed the certified copies of Sregzinski’s Oregon judgment with Sregzinski before sentencing. *Id.* Finally, counsel explained she was renewing her request from the original sentencing hearing: “I said it at his original sentencing and it is still my argument today that I believe the 210 months is still a significant amount of time,” which would also be consistent with the plea agreement and take into account Sregzinski’s purported immaturity. *Id.* The prosecutor, on the other hand, urged the court to maintain the 280-month sentence, noting that “the *Blake* decision” had not “made any difference in Sregzinski’s . . . standard range.” *Id.* at 10.

The court proceeded to its oral ruling, declining to change Sregzinski’s term of confinement:

Okay. So the issue, of course, is the re-sentencing mandate.

. . .

In practical application, there is no change to the standard range sentence with the new offender score of nine.

. . .

[T]he court does not see a basis to alter the sentence that was imposed by [the first sentencing judge]. And so the Court will sentence Mr. Sregzinski to 280 months on Count 1 and 84 months on Count 2 for total months of confinement is [sic] 280.

Id. at 15. At no point did the court explain how Sregzinski could speak to his attorney confidentially during the resentencing hearing.

The court subsequently reordered the 280-month sentence in a written judgment. The order's recitation of Sregzinski's criminal history omitted his *Blake* conviction and listed his offender score as "9" rather than "9+," but was otherwise identical to the previous judgment's recitation. The court found Sregzinski was indigent and imposed only the \$500 VPA. As one of Sregzinski's community custody conditions, he was required to "participate in . . . [i]npatient or outpatient acohol [sic]/drug program at his expenese [sic]." CP at 91.

Sregzinski appeals his second judgment and sentence.

ANALYSIS

1. CALCULATION OF OFFENDER SCORE

Sregzinski contends the trial court erred in calculating his offender score because the State failed to prove his Oregon crimes were comparable to any Washington felony. Alternatively, he contends his trial counsel rendered ineffective assistance by failing to object to the comparability of the Oregon offenses. The State responds that Sregzinski relieved the State of its burden to prove the existence and comparability of the out-of-state convictions by stipulating to the State's recitation of his criminal history and admitting that his offender score included the Oregon convictions. We agree with the State.

The State generally bears the burden of proving the existence and comparability of out-of-state convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). This

is not an overly difficult burden and can be satisfied with “evidence that bears some ‘minimum indicia of reliability.’” *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 569, 243 P.3d 540 (2010) (quoting *Ford*, 137 Wn.2d at 480-81). This burden can also be satisfied by a defendant’s affirmative acknowledgment that his prior out-of-state convictions are properly included in his offender score. *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) (citing *Ford*, 137 Wn.2d at 483 n.5).

When a defendant pleads guilty pursuant to a plea agreement, the State and the defendant are each required to provide the court with their understanding of the defendant’s criminal history. RCW 9.94A.441; CrR 4.2(e). Here, the State submitted a statement of criminal history that included Sregzinski’s Oregon convictions. In lieu of making a separate statement of his criminal history, Sregzinski agreed that the prosecuting attorney’s statement of his criminal history, attached to his statement on plea of guilty, was “correct and complete.” CP at 14. Sregzinski indicated that his standard sentencing range was based on his criminal history, and that criminal history included out-of-state convictions. Finally, as part of the plea, he also acknowledged his offender score and standard range.

By affirmatively admitting that his criminal history correctly included the Oregon convictions and acknowledging that his offender score was 9+ based on a criminal history that included his out-of-state convictions, Sregzinski affirmatively acknowledged the existence and comparability of his criminal history. “[A] defendant’s affirmative

acknowledgment that his prior out-of-state . . . convictions are properly included in his offender score” relieves the State of its burden. *Ross*, 152 Wn.2d at 230 (emphasis omitted). “[O]nce a defendant acknowledges the existence and comparability of prior convictions, no further proof is necessary.” *State v. Mendoza*, 165 Wn.2d 913, 927, 205 P.3d 113 (2009) (citing *Ross*, 152 Wn.2d at 233). The State was not required to supplement Sregzinski’s stipulation with any additional proof. *See Ross*, 152 Wn.2d at 230.

Sregzinski protests that he only agreed to the “existence” of the Oregon convictions, not their “comparability,” citing *Mendoza*, 165 Wn.2d at 927. We disagree with this characterization of the record. Sregzinski affirmatively agreed that the statement of criminal history included his Oregon convictions and was complete and correct. Within his statement on plea of guilty, he acknowledged that his offender score, as calculated using the out-of-state convictions, was a 9+ and agreed to his sentencing range based on this offender score. Finally, Sregzinski agreed that based on this criminal history, offender score, and standard range, the parties had reached a plea agreement wherein each party would request a sentence within the agreed upon standard range. Once a defendant “acknowledg[es] that his prior out-of-state . . . convictions are properly included” in the calculation of his standard range, the State need not provide any more proof. *Ross*, 152 Wn.2d at 230.

The cases cited by Sregzinski to support his position are inapposite. *See State v. Thiefaul*, 160 Wn.2d 409, 413, 158 P.3d 580 (2007); *State v. Lucero*, 168 Wn.2d 785, 230 P.3d 165 (2010) (per curiam). Neither case involved sentencing after a plea or a defendant's affirmative acknowledgment of his criminal history and offender score including out-of-state convictions.

Sregzinski alternatively claims his trial counsel rendered ineffective assistance of counsel by failing to challenge the comparability of the Oregon convictions. Effective assistance of counsel is guaranteed by the state and federal constitutions. *See* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. To succeed on this claim, Sregzinski must show his trial counsel's performance was (1) objectively deficient and (2) prejudicial. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Failure to meet either element is dispositive. *See In re Pers. Restraint of Pleasant*, 21 Wn. App. 2d 320, 326, 509 P.3d 295 (2022). Sregzinski must also overcome a strong presumption that trial counsel's performance was effective. *McFarland*, 127 Wn.2d at 335; *see also Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

We decline to review Sregzinski's claim of ineffective assistance of counsel because the record is insufficient. Because we cannot perform a comparability analysis on this record, we cannot determine whether counsel's performance was deficient or whether any deficiency resulted in prejudice. *McFarland*, 127 Wn.2d at 335; *see State v. Lazcano*, 188 Wn. App. 338, 355-56, 354 P.3d 233 (2015) (citing RAP 2.5(a)(3)). If

Sregzinski has evidence, outside the present record, indicating that a comparability challenge would have succeeded, his remedy for this error is to file a personal restraint petition and argue his counsel was ineffective through a collateral attack. *See McFarland*, 127 Wn.2d at 338.

2. RIGHT TO CONFER WITH ATTORNEY

Sregzinski contends the trial court violated his right to confer privately with his attorney at resentencing because he appeared remotely via videoconference and the court failed to set ground rules on how confidential communication could take place. The State argues that any error was waived because Sregzinski did not object below. We conclude that even under a constitutional harmless error analysis, any error was harmless.

At the resentencing hearing, Sregzinski did not raise an objection based on the inability to confer privately with his attorney. Generally, we do not address unpreserved error unless the defendant can demonstrate manifest constitutional error. RAP 2.5(a)(3). While our jurisprudence on the correct procedures for video hearings continues to evolve, we have consistently held that a defendant raising an unpreserved issue of interference with the right to privately confer with counsel during a video hearing is subject to review if the defendant can show manifest constitutional error. *See State v. Anderson*, 19 Wn. App. 2d, 556, 563, 491 P.3d 880 (2021); *Bragg v. State*, 28 Wn. App. 2d 497, 507, 536 P.3d 1176 (2023); *State v. Dimas*, ___ Wn. App. 2d ___, 544 P.3d 597, 600-01 (2024).

Under this standard, Sregzinski must demonstrate that the error is truly of constitutional magnitude and manifest. *Dimas*, 544 P.3d at 601.

Sregzinski demonstrates that the trial court's failure to ensure he could confer privately with his attorney at resentencing is an error of constitutional magnitude. Under both the Washington and United States Constitutions, criminal defendants are entitled to the effective assistance of counsel at sentencing hearings. *See State v. Heddrick*, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009) (citing U.S. CONST. amend. VI; WASH. CONST. art. I, § 22); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) ("Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally entitled to be represented by counsel."). "Among other things," the right to counsel "requires individuals charged with crimes to be able to confer privately with their attorneys at all critical stages of the proceedings."⁵ *Anderson*, 19 Wn. App. 2d at 562-63; *see also Bragg*, 28 Wn. App. 2d at 503-04. "When videoconferencing is used, courts must take care to ensure criminally accused persons are able to confidentially confer with counsel throughout the proceedings." *Anderson*, 19 Wn. App. 2d at 558.

Both the court rules and our Supreme Court have authorized certain hearings to be conducted with persons appearing remotely. However, even when authorized, a trial

⁵ The constitutional right to privately confer with counsel during a hearing is separate from the right to physical presence at a hearing. *See State v. Anderson*, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021). Sregzinski argues that only the former right was violated, not the latter.

court is responsible for ensuring that the defendant has a means of privately communicating with their attorney. *See* CrR 3.4(e)(1), (3); Order Regarding Court Operations After October 31, 2022, No. 25700-B-697, at 4 (Wash. Oct 27, 2022) <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%2025700A697.pdf>.⁶

In *Bragg*, Division 1 interpreted our decision in *Anderson* as not establishing a bright line rule that courts commit a per se constitutional violation if they fail to establish a process on the record for confidential attorney-client communication. 28 Wn. App. 2d at 507. Instead, the court in *Bragg* held that “reviewing courts should consider the totality of the circumstances, including whether the trial court explicitly established a process for such communications, given the variety of different circumstances that may occur.” *Id.* (emphasis omitted). One such consideration, however, is whether the court provided specific guidance for private communications on the record. *Id.* at 508.

Here, there is nothing in the record indicating that Sreglinski could confer privately with his attorney during the resentencing, or knew that he had the option to do

⁶ Paragraph 7 of the Order provides: “Courts should continue to allow telephonic or video appearances for all scheduled criminal and juvenile offender hearings whenever appropriate. All in-person appearances must be conducted with strict observance of public health measures. *For all hearings that involve a critical stage of the proceedings, courts shall provide a means for defendants and respondents to have the opportunity for private and continual discussion with their attorney.*” (Emphasis added.)

so. The court did not establish guidelines on the record and there is no indication that a process was available. This was error.

Sregzinski also demonstrates that the error was manifest. An error is manifest when a defendant shows actual prejudice. *Dimas*, 544 P.3d at 601. To do so, the defendant must “make a plausible showing that the claimed error had practical and identifiable consequences at trial.” *Id.*

Assuming we find manifest error, we then apply a constitutional harmless error analysis, which places the burden on the State to show that any error was harmless. *Anderson*, 19 Wn. App. 2d at 564. However, the analysis for prejudice under manifest error and the analysis for constitutional harmless error are different. *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009).

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

Id. (footnote omitted) (citation omitted).

Considering the circumstances in this case, along with existing case law, court rules, and the Supreme Court directive, we conclude that the failure to ensure that

Sregzinski could confer privately with his attorney during resentencing was a practical and identifiable error that the trial court could have foreseen and should have corrected even without an objection. Thus, it was manifest.

Establishing constitutional manifest error does not end the analysis. Sregzinski argues that the error was structural and once found, requires automatic reversal, citing *State v. Ulestad*, 127 Wn. App. 209, 215, 111 P.3d 276 (2005). We follow our decision in *Bragg* where we noted that *Ulestad* was distinguishable because it dealt with deprivation of counsel at trial and a right to constant communication granted by a separate statute. *Bragg*, 28 Wn. App. 2d at 512. Instead, we confirm that once a constitutional error is found, the burden shifts to the State to show the error was harmless beyond a reasonable doubt. *Id.*; *Anderson*, 19 Wn. App. 2d at 564.

Here, we conclude that the State has met its burden of showing the error was harmless. As Sregzinski's own counsel conceded at resentencing, the hearing "fe[lt] like a formality" because nothing had changed from the initial sentencing hearing, including Sregzinski's standard range and the plea agreement. RP (Feb. 7, 2023) at 9. Indeed, the court imposed the same sentence it had imposed at the initial sentencing hearing in which all parties appeared in person.

Sregzinski contends that, had he been able to privately consult with his attorney during the resentencing hearing, his attorney may have raised the comparability argument he now advances on appeal. This argument is speculative under this record. Defense

counsel acknowledged on the record that she had reviewed a certified copy of the Oregon judgment with her client before sentencing. There is nothing to show that a private conversation with Sregzinski during the hearing would have changed her analysis of the Oregon conviction.

3. COMMUNITY CUSTODY CONDITIONS AND LFOs

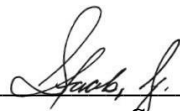
Sregzinski assigns error to a condition of his community custody, by which the trial court required him to complete “[i]npatient or outpatient alcohol [sic]/drug” treatment. CP at 91. He notes the record is devoid of evidence that alcohol—as opposed to other drugs—contributed to his crimes. The State agrees that, on remand, the word “alcohol” may be struck from the treatment requirement. We accept the State’s concession. *See State v. Jones*, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (“[W]e hold that alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.”); *see also State v. Houck*, 9 Wn. App. 2d 636, 646, 446 P.3d 646 (2019) (holding that trial courts lack authority to impose community custody conditions unless authorized by the legislature); RCW 9.94A.703(3)(c), (d) (authorizing trial courts to order rehabilitation programming as a condition of community custody only if it reasonably relates to the circumstances of the offense).

Sregzinski also assigns error to the court’s requirement that he “participate in” such treatment “at his expensese [sic],” because such a requirement is not statutorily authorized. CP at 91. The State concedes and we agree that Sregzinski may not be required to cover the expense of his substance abuse treatment. *See State v. Wemhoff*, 24 Wn. App. 2d 198, 200-02, 519 P.3d 297 (2022) (explaining that a legislative amendment taking effect in 2022 deleted a statutory subsection dealing with offenders’ obligation to pay their supervision fees). Finally, Sregzinski contends, and the State concedes, that the VPA should be struck on remand. The legislature amended the VPA statute by passing Engrossed Substitute H.B. 1169, 68 Leg., Reg. Sess. (Wash. 2023), with the amendments taking effect July 1, 2023. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023) (citing LAWS OF 2023, ch. 449, § 1). The statute now prohibits courts from imposing the VPA on defendants, like Sregzinski, who are found to be indigent, and requires courts to waive any VPA imposed before the effective date, on the offender’s motion, if the offender is unable to pay. *See RCW 7.68.035(4), (5)(b)*. This court should accept the State’s concession and remand with instructions to strike the VPA from Sregzinski’s sentence.

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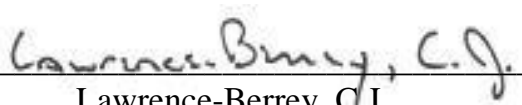
We affirm Sregzinski's sentence and remand for the limited purpose of striking the VPA from the judgment and sentence as well as the term "alcohol" from any treatment requirement. Additionally, the court shall delete the requirement that Sregzinski pay for his treatment costs.

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.




Staab, J.

WE CONCUR:



Lawrence-Berrey, C.J.



Pennell, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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