IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES LEWIS MATCHETTE, Appellant.	No. 39054-0-II consolidated with No. 39060-4-II UNPUBLISHED OPINION

Taylor, J.P.T.[1] — James Lewis Matchette[2] appeals the trial court's denial of his CrR 7.8 motion to withdraw his guilty pleas under two Pierce County cause numbers. Matchette argues that the trial court erred when it found that his guilty pleas were knowing, intelligent, and voluntary. He also argues that he received ineffective assistance of trial counsel due to his counsel's failure to investigate whether his prior federal bank robbery convictions were comparable to "most serious offense[s]"[3] and therefore strike offenses under the Persistent

[1] Judge Taylor is serving as judge pro tempore of the Court of Appeals, Division II, under CAR 21(c).

[2] Matchette's last name is also spelled "Matchett" in the record. *See e.g.* Clerk's Papers (CP) at 188. At his sentencing hearing, Matchette's counsel indicated that the proper spelling was "Matchette." VII Verbatim Report of Proceedings (VRP) at 592. We use that spelling throughout this opinion.

[3] RCW 9.94A.030(29).

Offender Accountability Act[4] (POAA), before advising him that these convictions were strike offenses. Matchette contends that under *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), federal bank robbery convictions are not comparable to a Washington strike offense. He also argues that the trial court violated his due process rights at the CrR 7.8 hearing by allowing him to proceed pro se without first advising him of the risks and advantages of so doing. We affirm.

FACTS

I. Guilty Pleas

On July 25, 2006, the State charged Matchette under Pierce County cause number 06-1-03416-5 with the second degree rape of SS. On December 12, the State filed a persistent offender notice, advising Matchette that because he had two prior strike offenses and the rape charge was also a strike offense, he would be classified as a persistent offender and sentenced to life without the possibility parole if convicted on the rape charge. A week later, the State amended the information, charging Matchette with second degree rape, unlawful imprisonment, and felony harassment. Matchette refused to plead guilty, and the case proceeded to a jury trial.

Meanwhile, on April 10, 2007, the State charged Matchette under Pierce County cause number 07-1-01943-1 with several additional offenses including second degree rape (with third degree rape in the alternative), second degree robbery, indecent liberties, and unlawful imprisonment, three of which are strike offenses. RCW 9.94A.030(31), (36). The State also filed a persistent offender notice related to this new set of charges.

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[4] RCW 9.94A.570; *see also* RCW 9.94A.030(36).

Matchette's trial on the first set of charges started on April 16. Although the State was initially unable to locate the complaining witness, 10 days into the trial, the State informed the trial court that it had located the witness and detained her on a material witness warrant. That weekend, Matchette contacted defense counsel and told him that he wanted to negotiate a plea. The following Monday, Matchette entered *Newton*[5] pleas to (1) felony harassment, unlawful imprisonment, and unlawful solicitation to possess a controlled substance under cause number 06-1-03416-5; and (2) unlawful imprisonment, second degree theft, and attempted unlawful delivery of a controlled substance under cause number 07-1-01943-1. At the plea hearing on April 30, 2007, defense counsel pointed out that Matchette "graduated from high school while he was in the federal prison. He completed a bachelor's and a master's." VI Verbatim Report of Proceedings (VRP) at 560-61. He described the plea discussions with his client as follows:

> I will tell the Court that this has been a very thorough and borderline heated discussion at times. I was in my den Saturday morning when Mr. Matchette called through through [sic] a fellow prisoner since he was on lockdown and requested that I do this. He and I have spoken about this for hours dating back months. I will tell you, he is—intelligence has never been Jimmy's problem. He's an exceptionally intelligent and articulate man. He understands what he's doing here. He is waiving fundamental rights knowingly, intelligently, and voluntarily, and I encourage the Court to accept his plea.

VI VRP at 566.

Finally, he provided further detail about issues important to the defendant as follows:

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[5] *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976) (defendant may plead guilty in order to take advantage of plea bargain even if he is unable or unwilling to admit guilt) (citing *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)).

> By the way, Mr. Matchette just reminded me, I have assured him none of these are sex offenses, and I have assured him that none of these are DV [domestic violence] offenses. This is of great significance to him because he's much more familiar than I with classification issues at the Department of Corrections. I stand by the record. I am positive when I say these are not sex, not violent, not DV. And [the prosecutor's] nodding in affirmation.

VI VRP at 567-68. The trial court accepted the pleas.

Matchette's prior convictions included a second degree robbery and at least two federal bank robberies.[6] At the sentencing hearing, defense counsel noted that the guilty pleas allowed Matchette to "walk[] away from two potential third strike trials." VII VRP at 588. The trial court entered the judgment and sentences on June 1. Because none of the offenses to which Matchette pled were strike offenses, the trial court did not conduct a comparability analysis to determine whether the federal bank robberies were strike offenses under Washington law.

II. Motions to Withdraw Guilty Pleas

Less than one year after his sentencing, Matchette filed identical pro se motions to withdraw his guilty pleas under both cause numbers. Matchette alleged that he had pleaded guilty because the State and defense counsel had erroneously advised him that his federal bank robbery convictions were strike offenses under the POAA and that he would be risking a third strike, and, therefore, subject to a sentence of life in prison without the possibility of parole if convicted as charged in either case. Citing *Lavery*, 154 Wn.2d 249, he asserted that federal bank robberies cannot be considered strike offenses under Washington law. He also asserted that defense counsel had provided ineffective assistance of counsel by failing to investigate whether the federal

[6] The judgment and sentence for the 2006 charges shows two federal bank robberies committed on January 24, 1992, and sentenced on September 12, 1994. The judgment and sentence for the 2007 charges shows three federal bank robberies committed and sentenced on those same dates.

bank robberies were strike offenses and by failing to advise him (Matchette) that they were not strike offenses.[7]

Before the motion hearing,[8] Matchette informed the trial court that he was proceeding pro se. When he made comments inferring that his waiver of counsel might be conditional, the following colloquy took place:

> THE COURT: Well, we're not going to proceed in that fashion. Would you like to proceed pro se today or—
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> MR. MATCHETTE: Absolutely, I would.
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> THE COURT: Let me finish my sentence, because if you believe you need the assistance of counsel and wish to have counsel, this court would certainly consider that and allow you to have counsel come to court today. So we're not proceeding today unless you are waiving your right to counsel and requesting to represent yourself.
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> MR. MATCHETTE: Yes, I want to represent myself just as I have through all of these proceedings, Your Honor.

X VRP at 642-43.

Defense counsel[9] testified that (1) when the State filed the persistent offender notices, Matchette asked him to "unfile[]" the notices because Matchette did not believe that federal bank robbery was a strike offense, X VRP at 659-60; (2) he told Matchette that he could not attack the notices at that time and that he believed the federal offenses were strike offenses; (3) he further

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[7] Matchette also alleged that his sentence exceeded the statutory maximum. In November 2007, the Department of Corrections notified the court and counsel that Matchette's 132-month sentence appeared to include a consecutive 12-month jail sentence for the misdemeanor conviction. These issues were apparently resolved when the trial court entered orders modifying the judgments and sentences and are not relevant to this appeal.

[8] The trial court initially transferred the CrR 7.8 motions to us for consideration as a personal restraint petition under CrR 7.8(c)(2). After determining that the issues involved factual determinations that we could not resolve, we transferred the motions back to the superior court.

[9] Matchette waived attorney/client privilege for purposes of this hearing.

told Matchette that he was not going to research the issue at that time because Matchette had insisted on going to trial and this was a sentencing issue that would not be relevant until and unless Matchette was convicted; (4) he did not investigate the comparability issue before Matchette entered his guilty pleas and was sentenced; and (5) although he had since read *Lavery*, 154 Wn.2d 249, he was still not sure whether federal bank robbery convictions could be strike offenses under Washington law. In contrast, Matchette testified that he did not know about *Lavery* until after he was sentenced and that he had relied on defense counsel's and the State's characterization of the federal offenses as strike offenses and pleaded guilty in order to avoid two potential third strike convictions.

During the hearing, defense counsel did not testify about any facts related to the federal bank robbery convictions, and Matchette did not seek to admit any documents disclosing the facts of those convictions. The only information Matchette disclosed about the federal offenses was in response to the State questioning him about his prior crimes of dishonesty: Matchette responded: "I only robbed banks and jewelry stores and federally insured institutions. I never robbed a person in my life."[10] X RP at 758.

The trial court denied the CrR 7.8 motion. It found that the evidence showed that (1) when Matchette decided to plead guilty, he did so knowing that there was a chance that the federal offenses were not strike offenses; (2) Matchette did not rely on defense counsel's

[10] Matchette explained that at the time of the robberies, he "was in a little revolutionary mode," and he believed that he was taking back money stolen from his ancestors. X VRP at 758. He also asserted that whether taking money from "a corporation" was "dishonest," was "open to interpretation," and stated that he was "justified" in taking the money, in part, because he "donated a lot of that money back to some people and some organizations." X VRP at 759.

representations about those prior offenses when he chose to plead guilty; (3) defense counsel's initial failure to investigate was reasonable given the need to focus on the trial at that time; (4) Matchette knew that defense counsel had not investigated the comparability issue, yet he chose to plead guilty anyway and, therefore, Matchette "abandon[ed] any issues relating to his status as a Persistent Offender"; and (5) Matchette benefitted from the pleas. Clerk's Papers (CP) at 142. The trial court also found Matchette's claim that "he did not take money that belonged to someone else," was not credible. CP at 139. Matchette appeals.

ANALYSIS

I. Motion to Withdraw Guilty Pleas

We review a trial court's decision on a motion to withdraw a post-sentencing guilty plea for abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). A trial court abuses its discretion if it bases its decision on clearly untenable or manifestly unreasonable grounds. *State v. Olmsted*, 70 Wn.2d 116, 119, 422 P.2d 312 (1966). We may affirm the trial court on any ground supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); *see also* CrR 4.2(d). A defendant wishing to withdraw a guilty plea has the burden of showing that a manifest injustice exists. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996); *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). A "'manifest injustice' is 'an injustice that is obvious, directly observable, overt, not obscure.'" *Saas*, 118 Wn.2d at 42 (quoting *State v.*

Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). A defendant can establish manifest injustice by showing ineffective assistance of counsel or by showing that his plea was involuntary. *Taylor*, 83 Wn.2d at 597.

To establish ineffective assistance of counsel, Matchette had to show deficient performance and resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have differed. *Stenson*, 132 Wn.2d at 706. In a plea bargaining context, effective assistance of counsel requires that counsel actually and substantially assisted his client in deciding whether to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

Ultimately, Matchette's ineffective assistance of counsel claim depends on whether defense counsel erred when he advised Matchette that the federal bank robberies were strike offenses under Washington law. But Matchette's assertion that his federal bank robberies were not strike offenses erroneously presumes that, under *Lavery*, federal bank robbery convictions can never be comparable to a Washington strike offense.

> To determine whether a foreign conviction should count as a strike offense, the court employs a two-part comparability analysis. The court first determines whether the elements of the foreign offense are substantially similar to the Washington offense. If the elements of the foreign offense are broader, the court must determine whether the offense is factually comparable; i.e., whether the conduct underlying the foreign offense would have violated the comparable Washington statute. If a factual analysis is necessary, the court considers only facts admitted or stipulated by the defendant, or proved beyond a reasonable doubt. If a foreign conviction is neither legally nor factually comparable, it does

not count as a most serious offense under the POAA.

In re Pers. Restraint of Carter, 154 Wn. App. 907, 920-21, 230 P.3d 181 (citing *State v. Johnson*, 150 Wn. App. 663, 676-77, 208 P.3d 1265, *review denied*, 167 Wn.2d 1012 (2009)), *review granted on other grounds*, No. 84606-5 (Wash. Nov. 2, 2010).

Although the *Lavery* court held that federal bank robbery is not legally comparable to the corresponding Washington strike offense of second degree robbery because it is broader than the corresponding state offense, it did not hold that federal bank robbery can never be factually comparable to second degree robbery. *Lavery*, 154 Wn.2d at 256, 258, 261-62; *see also State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The *Lavery* court did not preclude courts from conducting a factual comparability analysis under any circumstances—it rejected the factual comparability based on the specific facts of the case, holding that (1) courts may consider only those facts to which the defendant admitted or stipulated or those facts proved beyond a reasonable doubt when determining factual comparability, and (2) Lavery had never admitted to or stipulated to facts that would establish the specific intent element required to prove the comparable Washington offense. *See Lavery*, 154 Wn.2d at 258; *see also Thiefault*, 160 Wn.2d at 415, 417 (remanding for factual comparability limited to "facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt") (citing *Lavery*, 154 Wn.2d at 258).[11]

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[11] We note that remand is not the appropriate remedy here. The issue in *Thiefault* was whether defense counsel rendered ineffective assistance of counsel in failing to object to the superior court's comparability analysis of a foreign offense at sentencing. *Thiefault*, 160 Wn.2d at 414. Although the *Thiefault* court remanded for a factual comparability analysis, there was enough information in the record to suggest that the facts the defendant admitted or stipulated to or the facts proven at trial would not have supported a comparability finding. *Thiefault*, 160 Wn.2d at

At the CrR 7.8 hearing, Matchette did not present any information revealing what, if any, facts he admitted or stipulated to or what facts were proven beyond a reasonable doubt in relation to the federal convictions. Thus, he did not demonstrate that defense counsel misadvised him about the potential sentences he was facing if he chose to go to trial, nor did he show that defense counsel's representation was prejudicial. What he did show is that he was aware the impact of the federal convictions was a significant unresolved issue which did not need to be resolved if he was able to negotiate a plea deal involving only non-strike offenses. The plea deal that was negotiated for him was remarkably beneficial on several levels. Accordingly, Matchette did not establish ineffective assistance of counsel.

Similarly, even assuming that a valid plea requires that the defendant be accurately advised of the potential penalties he would face if he went to trial rather than plead guilty, Matchette's failure to present any evidence demonstrating that his federal bank robbery convictions were not factually comparable to a Washington strike offense is also fatal to his involuntary plea claim.[12] Without establishing that his federal offenses were not factually comparable to a Washington

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417. Here, there is nothing in the record relevant to the factual comparability analysis so remand is not appropriate. *See State v. Birch*, 151 Wn. App. 504, 519-20, 213 P.3d 63 (2009) (rejecting ineffective assistance of counsel claim based on failure to object to inclusion of foreign offense in criminal history without a comparability analysis and holding that remand is not appropriate when defendant "fails to point to anything in the record indicating his [foreign] robbery conviction was not factually comparable."), *review denied*, 168 Wn.2d 1004 (2010).

[12] Matchette appears to argue that the trial court erred in focusing on his "subjective reliance" on counsel's alleged misrepresentation. Br. of Appellant at 19. The trial court's findings do suggest that it may have focused whether Matchette had relied on his counsel's representations or misrepresentations. To the extent the trial court relied on the materiality of the alleged misinformation, Matchette is correct that the trial court erred on that basis. *Isadore*, 151 Wn.2d at 302. But because Matchette fails to show that his federal offenses were not factually comparable to a Washington strike offense, this error is not dispositive.

strike offense, Matchette did not establish that he was unable to adequately assess his risks before entering his pleas.

Because Matchette did not establish ineffective assistance of counsel or that his guilty pleas were not knowing, voluntary, and intelligent, the trial court did not err when it denied Matchette's motion to withdraw his guilty pleas.

II. Waiver of Right to Counsel

Finally, Matchette argues that his waiver of counsel at his CrR 7.8 hearing was not knowing, voluntary, and intelligent because the trial court failed to advise him of the risks and advantages of proceeding pro se before allowing him to do so. But Matchette fails to recognize that the constitutional right to counsel does not attach to post-sentencing CrR 7.8 motions. RCW 10.73.150; *State v. Robinson*, 153 Wn.2d 689, 696, 107 P.3d 90 (2005) (there is no constitutional right to counsel for CrR 7.8 motions unless provided elsewhere in the rules or constitution). He also fails to recognize that, despite the absence of any right to counsel, the trial court offered him appointment of counsel, and he declared he was comfortable handling the matter pro se.

Because Matchette's claim is not constitutional in nature, any potential error in failing to advise him of the risks of proceeding pro se is subject to harmless error analysis. *See Robinson*, 153 Wn.2d at 697. Matchette fails to allege, let alone establish, that there is any reasonable probability that the outcome of the hearing would have differed had the trial court advised him of the risks of self-representation. Accordingly, this argument fails.

We affirm.

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

Taylor, J.P.T.

We concur:

Armstrong, J.

Worswick, J.