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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD A PLECHNER,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 04-1-00283-4

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Plechner's motion to reconsider its order dismissing his case without prejudice and to have his charges dismissed with prejudice.
02. The trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 16.
03. The trial court erred in permitting Plechner to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the court's instruction 16.
04. The trial court erred in not dismissing Plechner's conviction for assault in the third degree, count I, where the assault was incidental to, a part of, or coexistent with his conviction for hit and run (injury), count III.
05. The trial court erred in calculating Plechner's offender score and in imposing a sentence that exceeded the statutory maximum for the crimes of conviction.
06. The trial court erred in permitting Plechner to be represented by counsel who provided ineffective assistance by failing to argue that his convictions for assault in the third degree and hit and run (injury) encompassed the same criminal conduct for sentencing purposes and that the court imposed a sentence that exceeded the statutory maximum for the crimes of conviction.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in denying Plechner's motion to reconsider its order dismissing his case without prejudice and to have his charges dismissed with prejudice? [Assignment of Error No. 1].
02. Whether the trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 16? [Assignment of Error No. 2].
03. Whether Plechner was prejudiced as a result of his trial counsel's failure to object to or by agreeing to the court's instruction 16? [Assignment of Error No. 3].
04. Whether the trial court erred in not dismissing Plechner's conviction for assault in the third degree, count I, where the assault was incidental to, a part of, or coexistent with his conviction for hit and run (injury), count III? [Assignment of Error No. 4].
05. Whether the trial court erred in counting Plechner's convictions for assault in the third degree and hit and run (injury) in calculating his offender score and in imposing a sentence that exceeded the statutory maximum for the crimes of conviction? [Assignment of Error No. 5].
06. Whether Plechner was prejudiced by his counsel's failure to argue that his convictions for assault in the third degree and hit and run (injury) encompassed the same criminal conduct for sentencing purposes and that the court imposed a sentence that exceeded the statutory maximum for the crimes of conviction? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Richard A. Plechner (Plechner) was charged by fourth amended information filed in Mason County Superior Court on May 12, 2005, with assault in the third degree, count I, taking motor vehicle without owner's permission in the second degree, count II, and hit and run (injury), count III, contrary to RCWs 9A.36.031(1)(d), 9A.56.075(1) and 46.52.020(4)(b). [CP 79-81].

The court denied Plechner's CrR 3.5 motion and entered the following Findings of Fact and Conclusions of Law:

FINDINGS OF UNDISPUTED FACTS

1. On July 1, 2004, Shelton Police Department Sergeant Jeff Rhoades and Sheldon Police Department Officer Paul Campbell were dispatched to investigate an accident at 11th and Cota in Shelton, Mason County, Washington. That Officer Campbell initially observed the defendant, Richard A. Plechner, proceeding from the direction of the incident down the ally towards the back of the defendant's residence. That Officer Campbell contacted the defendant in that alley, behind the defendant's residence, approximately three-fourths of a block from the scene of the incident.
2. That the contact between Officer Campbell and the defendant was an ongoing investigative stop and detention of the defendant.

3. That the conversation Officer Campbell had with the defendant initially occurred in the alley behind the defendant's residence and thereafter continued at the scene of the incident after the defendant got into Officer Campbell's patrol vehicle to return to the scene.

4. That the initial contact between Officer Campbell and the defendant behind the defendant's residence, the continuing contact between Officer Campbell and the defendant after returning to the scene of the incident, and the initial contact at the scene with Sergeant Rhoades were all non-custodial.

5. That the defendant was in custody, albeit without handcuffs, at the time of Sergeants (sic) Rhoades' second contact with him at the scene of the incident. That at the time of such second contact Sergeants (sic) Rhoades had had significant contact with the alleged victim and with witnesses who had made observations as to the defendant's level of intoxication.

DISPUTED FACTS

1. Whether the defendant advised Officer Campbell that he wanted to go into his residence and call his lawyer is a disputed fact.

2. Whether the defendant and Officer Campbell had a conversation before or after the defendant got into Officer Campbell's patrol vehicle is a disputed fact.

FINDINGS AS TO DISPUTED FACTS

1. That the defendant did not advise Officer Campbell that he wanted to go into his residence and call his lawyer.

2. That the defendant and Officer Campbell had a conversation before the defendant got in Officer Campbell's patrol vehicle.

Based upon the above findings, the court hereby makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of these proceedings and the parties to it;
2. The statements made to Officer Campbell by the defendant during his contact with him on July 1, 2004 were made in a non-custodial, investigative stop and detention setting and will be admissible at trial herein.
3. The statements made to Sergeant Rhoades by the defendant during his second contact with him on July 1, 2004 were made in a custodial, pre-Mirandization setting and will not be admissible in the state's case in chief at trial herein.

[CP 25-28; RP 120-21].

Trial to a jury commenced on May 10, 2005, the Honorable James B. Sawyer II presiding. The jury returned verdicts of guilty as charged, Plechner was sentenced within his standard range and timely notice of this appeal followed. [CP 3-6, 8-24, 47-49].

02. Substantive Facts: CrR 3.5 Hearing

On July 1, 2004, at approximately 6:45 p.m., Officer Paul Campbell was dispatched to an incident that resulted in his

contacting Plechner. [RP 82]. Prior to this contact, Campbell was aware that someone had been run over by a car and that Plechner was leaving the scene. [RP 90]. When he arrived at he scene, he “saw Mr. Plechner running ... towards his house.” [RP 82]. When Campbell contacted Plechner “right behind his house(,)” he appeared to be intoxicated, under the influence of alcohol. [RP 83, 90]. Campbell had no “idea if he, if he was involved.” [RP 92]. “Is he a suspect? Is he the victim? We don’t know at that point.”]RP 92]. Campbell asked Plechner if “he had been involved in an altercation we had gotten called to, and he said yeah, that he was over there.” [RP 84]. “His demeanor was cooperative and he gave me his side of the story.” [RP 84]. He was not in custody. [RP 85].

Plechner voluntarily got into Campbell’s patrol car and returned to the scene, where he was arrested approximately 20 minutes later. [RP 85-86].

Rhoades testified that after he interviewed two eyewitnesses and the victim, “we determined there was probable cause for his arrest.” [RP 96]. Until then, Plechner had not been advised of his rights “(b)ecause he was not in custody at that point. He was not under arrest.” [RP 99].

According to Plechner, Campbell first contacted him by his garage, saying he needed to talk to him [RP 102]. Campbell refused to let him go inside his house to call his lawyer [RP 103-04, 109] and made him get into

his patrol vehicle and return to the scene. “I had no choice.” [RP 107]. Plechner did not talk to Campbell about what had happened until they returned to the scene, where Rhoades handcuffed him. [RP 106-09].

In rebuttal, Campbell asserted that Plechner never indicated that he wanted to go into his house to call his lawyer, that he (Campbell) never instructed Plechner to get into his patrol vehicle, and that the scene was within 15 seconds by car from where he first contacted Plechner: “about four houses” away. [RP 115]. Rhoades testified that Plechner was not handcuffed until after he was taken into custody. [RP 116].

03. Substantive Facts: Trial

On July 1, 2004, shortly before 7:00 p.m., Julie Waldrop was sitting in a motor home with Phil Brown, her “significant other,” when she heard a car “going very fast” come to a “skidding halt.” [RP 129]. Otto Holz got out of the passenger’s side of the silver pickup and appeared to be arguing with the driver. [RP 130-31]. At some point, Holz “either fell or he tripped or he was hit by the truck and knocked him off balance... (H)e went down.” [RP 133]. Holz appeared to be “under the influence of something.” [RP 142]. “He was definitely incapacitated.” [RP 142]. “Then the truck ran over him.” [RP 133]. “(T)he rear wheels rolled over the top of him.” [RP 150].

(T)hen the truck stopped. The driver got out of the driver's side, walked around the truck and stood there, looking at Mr. Holz on the ground. Again, there was some verbal exchange going on and we saw the driver drop something, which appeared to be the car keys, onto Mr. Holz's abdomen area. He was lying flat on the ground.

[RP 134].

After hearing Waldrop say "he ran over him," Brown "dialed 911 and called the police." [RP 165, 178]. The driver, who Waldrop identified as Plechner, eventually walked from the scene down the alley "heading for home." [RP 135, 137-38, 166-67].

Otto Holz met Plechner in the parking lot of a market in Allyn, Washington, on June 29, 2004, when Plechner asked Holz if his pickup truck was for sale. [RP 184-86]. After Plechner offered to buy the pickup for \$800 plus title to another vehicle, Holz told him he would have to think about it and got his phone number, which he called on July 1. [RP 185-88].

Holz and Plechner met later that day in Allyn and discussed the sale of the pickup while drinking several beers. [RP 190-91]. Holz agreed to drive Plechner home to Shelton, where they first stopped at a restaurant to have dinner and more drinks. [RP 191]. They left the restaurant at approximately 5:45 p.m. and drove to Plechner's residence, where Holz planned to see the vehicle Plechner was offering as part of the deal. [RP

196-97]. After they arrived at the residence, Plechner asked if he could
“drive the pickup.” [RP 198]. “I didn’t see any reason not to.” [RP 198].

He got into the truck on the - got in the driver’s
seat, turned around and started it and it took off
fairly in a jump start, he was playing like Mario
Andretti off of the gosh darn starting block. By the
time we reached a cross street he was indicating he
was going to go right, and by the time we went right
he started to pick up speed and I said, I’ve had
enough of this B.S., and I said pull on over and get
out.

[RP 201].

I told him, I said, get out of my truck and walk
home, I’ve had enough of your bullshit.

....

He was not going to comply, so I reached on over –
with my left hand – and shut the ignition off and
then pulled the keys out of the ignition and snapped
them onto my belt buckle, onto my belt loop..

....

The keys were buckled to my loop. He grabbed a
hold of them and he yanked them off and then he
stuck the keys back in the ignition and started it up.

....

I started to reach on over to remove them a second
time and then that’s when I, I don’t know what
happened after that. I – the lights went out.

[RP 202].

During cross examination, Holz admitted to having prior DUIs but
denied telling Plechner he had four or that the next time he got a DUI he’d
go to jail for a year. [RP 239-240]. He remembered seeing Plechner again

after the police had placed him in handcuffs. [RP 259]. Holz told Sergeant Rhoades at the scene that Plechner had run over him. [RP 293].

Officer Campbell testified consistent with his CrR 3.5 testimony, adding that Plechner told him he had pulled the ignition wires on the pickup because Holz was too intoxicated to drive. [RP 272]. Plechner, who “stated he was not driving; he was too drunk(,)” also told Campbell that while he was pushing the pickup it may have gone over Holz’s leg or Holz fell and the vehicle rolled over his leg, giving three versions of where Holz was located: the passenger door, looking under the front hood and near the front edge of the vehicle. [RP 272-274]. Campbell said Holz never saw Plechner in handcuffs that evening [RP 277], and Rhoades confirmed that Plechner was never in handcuffs while Holz was at the scene. [RP 322]. Campbell checked the pickup and found that the ignition wires “had not been pulled out.” [RP 286].

Plechner testified that on the day in question he arrived at Holz’s house at approximately 9:45 a.m. and then left with Holz around 3:35 p.m. and went to a restaurant. [RP 352-56]. They left the restaurant with the plan to transfer the title to Holz’s pickup from Holz to Plechner. [RP 360]. When they stopped at a place “that does private licensing,” Holz got out of the car and “went around the corner to take a leak behind a

dumpster.” [RP 361. Holz later told Plechner that he had tripped while doing so. [RP 362]

On the drive to Plechner’s house, Holz drove over a curb and into oncoming traffic before pulling up in front of Plechner’s house, where they stayed for about five minutes. [RP 363-65].

With Holz driving, they then left to go to Hanks Lake to meet some girls. [RP 366, 374]. Plechner did not have a driver’s license or insurance. [RP 368]. Perceiving that Holz was “becoming super drunk(,)” Plechner tricked him into stopping the car and getting out to look at some defect while Plechner “slid to the driver’s side of the car to get control of the, the car.” [RP 376]. Holz then got in the passenger’s side and Plechner drove forward around the corner where Holz told Plechner to stop the truck before getting out and going around to the driver’s side and arguing that he wanted to drive. [RP 377-78].

Holz told Plechner to get out of the truck because he wanted to drive home. Plechner did not give him the keys because he feared for Holz’s safety. [RP 382-86]. At this point, Plechner “wanted to get parked and get the hell out of there.” [RP 385]. In order to move the car off the main road, Plechner drove it “(v)ery, very slowly(,)” inching the car forward while Holz was standing in front of it. [RP 387-88]. “I was afraid that we were gonna get hit, we were gonna get rear-ended. And I

wanted to get the truck off the road and parked.” [RP 389]. After Holz had changed positions and Plechner attempted to pull the truck forward, he heard Holz say, “you son of a bitch, you ran over my foot.” [RP 391]. Plechner could not see Holz at this point and did not know the truck had run over him. [RP 391-92].

When Plechner got out of the truck, Holz told him to push it back so he could get into it, which Plechner did. [RP 394]. The plan was to “get us out of there.” [RP 395]. After Plechner tried to lift Holz up, Holz told him to “just leave me.” [RP 395]. “I reached across the truck, got the keys, dropped them on his lap and said, you’re on your own.” [RP 395]. Plechner did not believe Holz was hurt. [RP 397-99].

Plechner admitted to telling Campbell he had not been driving, but did so because he was within three months of getting his license and he wasn’t sure Holz had been run over. [RP 400-02, 422].

Dan Morse, a private investigator interviewed Brown, Waldrop and Holz. Waldrop told him she never saw the truck strike Holz in the legs and that she thought Holz had tripped over his own feet and fell. [RP 438-39]. Both Brown and Waldrop also told Brown that Plechner had tried to lift Holz up as if he was trying to put him back in the car. [RP 439]. Holz told the investigator he wasn’t sure how Plechner started

driving and that he didn't know how Plechner had got the vehicle. [RP 440].

In rebuttal, Holz testified contrary to Plechner's testimony by asserting that the key to his truck could be removed when the car was running and that Plechner never tricked him into getting out of the vehicle. [RP 447-49]. Campbell testified that Plechner never told him that he tricked Holz into getting out of the vehicle. [RP 471 Sergeant Rhoades stated that the key to Holz's vehicle could not be removed while the car was running and that Waldrop had told him that Holz's had been bumped by the truck twice and had tripped over his own feet. [RP 467-69]. Rhoades never asked Holz if he had a driver's license and never investigated Holz in any manner. [RP 482-83].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN DENYING PLECHNER'S MOTION TO RECONSIDER ITS ORDER DISMISSING HIS CASE WITHOUT PREJUDICE AND TO HAVE HIS CHARGES DISMISSED WITH PREJUDICE.

Under CrR 8.3(a), the trial court has discretion to dismiss criminal charges "upon written motion of the prosecuting attorney setting forth the reasons therefor(.)" See State v. Bible, 77 Wn. App. 470, 471, 892 P.2d 116, petition denied, 127 Wn.2d 1011 (1995). On

January 4, 2005, the prosecutor apparently went before an ex parte judge¹ and made an oral motion to dismiss the case against Plechner without prejudice, which was granted:

IT IS HEREBY ORDERED that this matter be dismissed without prejudice on the oral motion of the state, the state having advised that two material witnesses are unavailable to the state until approximately April of this year. The defendant may be released on this cause forthwith.

[CP 102].

At time of entry of the above order, Plechner's case for set for trial on the week of January 3, 2005. The speedy trial period was to expire on January 10, 2005. [CP 106]. On January 24, the trial court denied Plechner's motion for reconsideration and to have the charges dismissed with prejudice. [RP 78]. In ruling that the "Order of Dismissal Without Prejudice is confirmed [RP 78](,)" the trial court noted that when the prosecution found out that the two witnesses were "reasonably unavailable ... they were put in a position of having to either try and proceed without a critical witness or proceed – or do what they've done and that is the dismissal." [RP 77]. "This does fall within the discretion of the Court, and

¹ The order dismissing the case without prejudice is signed only by the judge and the prosecuting attorney. [CP 102].

under the circumstances, a dismissal without prejudice was appropriate.”

[RP 78].

In State Bible, 77 Wn. App. at 472, Division I of this court held that under CrR 8.3(a), the State may make a motion to dismiss for the purpose of delaying expiration of the speedy trial period, as long as there is a sufficient reason apart from running of the speedy trial period. Under the facts in Bible, the court found that the State’s failure to obtain material witnesses was a legitimate reason for dismissal without prejudice under CrR 8.3(a). State v. Bible, 77 Wn. App. at 473.

Bible, however, is factually dissimilar from the instant case. In Bible, the material witnesses, who the State had been attempting to contact since the arraignment, apparently left before the prosecutor had an obligation to preserve their testimony at trial and could not be located and were believed to have moved out of state. State v. Bible, 77 Wn. App. at 471. In contrast, the two material witnesses at issue here were previously under subpoena, which had lapsed on November 2, 2004, but were not under subpoena at the time the order dismissing the case without prejudice was entered on January 4, 2005, and had not been under subpoena for over two months. [CP 91]. Yet the record is devoid of any competent evidence indicating that the prosecutor took sufficient steps to secure their appearance or testimony at trial, especially given that the subpoenas for the two material

witnesses “were unsuccessfully attempted to be served on them on December 16, 2004” and the State took no further action to procure their appearance or testimony at trial for at least two weeks thereafter. [CP 91].

The dismissal should have entered with prejudice, and the trial court erred in ruling to the contrary under CrR 8.3(a), where no written motion was filed, and in affirming its order of dismissal without prejudice.

02. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASHINGTON CONSTITUTION ART. 4, SEC. 16 BY GIVING INSTRUCTION 16.

The trial court impermissibly commented on the evidence concerning count II, taking motor vehicle without owner’s permission in the second degree, when it submitted instruction 16 to the jury, which states, in relevant part:

To convict the defendant of the crime of taking a motor vehicle without permission in the second degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 1st day of July, 2004, the defendant intentionally took or drove away an automobile or motor vehicle, to wit: a Mitsubishi truck, WL# A91868N, without permission of the owner or person entitled to possession thereof;; [Emphasis added]

(2) That the motor vehicle was the property of another, to wit: Otto Holz.... [Emphasis added].

[CP 68].

This instruction relieved the State of its burden of proving every essential element of the crime of taking motor vehicle without owner's permission in the second degree beyond a reasonable doubt in violation of Art. 4, sec. 16 of the Washington Constitution. An instructional error requires reversal when it relieves the State of its burden of proving every essential element of the crime. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

Art. 4, sec. 16 of the Washington Constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses. State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). It is error for a judge to instruct the jury that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). And while a defendant on appeal is ordinarily limited to specific objections raised before the trial court, he or she may, for the first time on appeal, argue that an instruction was an improper comment on the evidence. State v. Tili,

139 Wn.2d 107, 126 n.9, 985 P.2d 365 (1999) (citation omitted); See also, State v. Becker, 132 Wn.2d at 64; RAP 2.5(a)(3).

It was manifest error for the court to submit instruction 16 to the jury. To convict Plechner of taking motor vehicle without owner's permission in the second degree under instruction 16, the State, in part, was required to prove beyond a reasonable doubt that Plechner intentionally took or drove away an automobile that was the property of another without the permission of the owner or person entitled to possession of the motor vehicle. Instruction 16 could have been read as a direction or a comment by the court that the Mitsubishi did in fact belong to Otto Holz and was the vehicle taken or driven away without his permission, with the unassailable result that it provided an untenable method for the jury to find that Plechner committed the offense. The instruction effectively removed these factual concerns from the jury's consideration, and amounted to an unconstitutional comment on the evidence in violation of Art. 4, sec. 16 of the Washington Constitution.

As noted in State v. Jones, 106 Wn. App. 40, 45, 21 P.3d 1172 (2001), Washington courts have repeatedly condemned the use of "to-wit" language in jury instructions. "Counsel would be well advised to avoid the use of 'to wit' language in future 'to convict' instructions." Id. The

use of “to-wit” language runs the risk of constituting an improper comment on the evidence. The court’s instruction here at issue is analogous to the “to-wit” language criticized as constituting a comment on the evidence in State v. Becker, 132 Wn.2d at 64.

Once it has been demonstrated that a trial judge’s conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Moreover, “the harmless error doctrine does not apply to structural errors; rather, structural errors are subject to automatic reversal.” State v. Jackman, 125 Wn. App. 552, 560, 104 P.3d 686 (2004), review granted, 155 Wn.2d 1007 (Sept. 9, 2005) (citing Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

In Jackman, the defendant, for the first time on appeal, challenged the inclusion of the victim’s date of birth in jury instructions where the victim’s age was an element of the offense. In holding that the instructions were an improper comment on the evidence and not subject to harmless error analysis under Neder, the court, properly, reasoned that the instructions were tantamount to directing a verdict on that element of the offense and as a result infected the entire process. State v. Jackman, 125 Wn. App. at 560.

Instructing the jury as to an element or a fact is a structural error not subject to harmless error analysis. When an issue is taken away from the jury, it is fundamental and harmful. Our analysis is consistent with Primrose, Becker, and Neder.”

Id.²

Under this reasoning, the Jackman court declined to apply harmless error analysis even though the victims had testified to their ages and Jackman had not contested that testimony, Jackman, 125 Wn. App. at 560. Similarly, here, as the court’s instruction 16 resolved factual issues as a matter of law, and thus constituted a comment on the evidence, the defect constitutes a structural error, not subject to harmless error analysis, with the result that Plechner’s conviction for taking motor vehicle without owner’s permission in the second degree must be reversed.

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² Cf. State v. Zimmerman, 130 Wn. App. 170, 121 P.3d 1216 (2005), where Division II, in a 2 to 1 decision involving two members not on the Jackman panel, disagreed with this conclusion, holding that “although we adhere to our ruling in Jackman that it is manifest error to include the victim’s date of birth in jury instructions when the victim’s age is an element of the offense, we decline to follow the portion of Jackman holding that this error is not subject to a constitutional harmless error test.”

03. PLECHNER WAS PREJUDICED AS A RESULT OF HIS TRIAL COUNSEL'S FAILURE TO OBJECT TO OR BY AGREEING TO THE COURT'S INSTRUCTION 16.³

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

³ While it has been argued in the preceding section of this brief that giving this instruction constituted constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Although Plechner did not propose the instruction here at issue, should this court find that trial counsel waived the issue relating to the court's instruction number 16 previously set forth herein by either affirmatively assenting to the instruction or by not objecting to the instruction, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have agreed to this instruction or would have failed to object to it for the reasons set forth in the preceding section of this brief. Had counsel done so, the trial court would not have given instruction 16, which, as previously argued herein, amounted to an unconstitutional comment on the evidence in violation of Art. 4, sec. 16 of the Washington Constitution.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: but for counsel's failure to object to or by agreeing to the court's instruction 16, the court would not have given the instruction and the jury would not have been provided with an untenable method to find that Plechner committed the offense.

04. PLECHNER MAY NOT BE CONVICTED OF ASSAULT IN THE THIRD DEGREE WHERE THE ASSAULT IS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR HIT AND RUN (INJURY).

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, reviewed denied, 143

Wn.2d 1009 (2001) (citing RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998); See also State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (citing State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the assault nor the hit and run (injury) statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.36.031; RCW 46.52.020 The offenses are thus not automatically immune from double jeopardy analysis. Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Plechner was convicted of assault in the third degree contains an element of criminal negligence, which is not contained in the hit and run (injury) statute. RCW 9A.36.031(1)(d). An essential element of hit and run (injury) under RCW 46.52.020(4)(b) is that the defendant knew he had been involved in an accident. The two offenses contain different elements and, therefore, are not established by the “same evidence test.” Thus the prohibition against double jeopardy is not violated here by applying the same evidence test. *See State v. Zumwalt*, 119 Wn. App. 126, 130, 82 P.3d 672 (2003).

Of course, the “same evidence” test is not always dispositive. *Burchfield*, 111 Wn. App. at 897. This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. *Id.*; *State v. Frohs*, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. “Thus, the merger doctrine is simply another means by which a court may determine

whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” *Id.* The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. *Calle*, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms the element.” [Emphasis Added]. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, the crime of assault in the third degree occurred in furtherance of the crime of hit and run (injury): The commission of the assault, which caused the injury, was required to prove the injury component of hit and run (injury). Thus the lesser crime of assault in the third degree was incidental to the greater crime of hit and run (injury) and merges into the greater. *See State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

05. THE TRIAL COURT ERRED IN CALCULATING PLECHNER’S OFFENDER SCORE AND IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIMES OF CONVICTION.

A challenge to the calculation of an offender score

may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, “that a defendant cannot agree to punishment in excess of that which the Legislature has established,” and that “in general a defendant cannot waive a challenge to a miscalculated offender score.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive

sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score,” the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

05.1 Current Convictions Encompassing Same Criminal Conduct

If two current offenses encompass the same criminal conduct, then those current offenses will only count as one point in calculating an offender’s score. RCW 9.94A.589(1)(a); State v. Haddock, 141 Wn.2d at 108. The same criminal conduct requires two or more offenses to involve (1) the same criminal intent, (2) the same time and place, and (3) the same victim. State v. Haddock, 141 Wn.2d at 109-10.

For purposes of same criminal conduct, intent is not defined as the specific intent required as an element of crime charged. Rather, the inquiry focuses on the extent to which criminal intent, as objectively

viewed, changed from one crime to another. State v. Dolen, 83 Wn. App. 361, 364, 921 P.2d 590 (1996) (addressing former RCW 9.94A.400(1)(a), now codified at RCW 9.94A.589(1)(a)). This analysis includes a determination of whether one crime furthered the other. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

To satisfy the same time requirement, offenses do not need to be simultaneous. State v. Porter, 133 Wn.2d 177, 183 942 P.2d 974 (1997) (two drug sales that occurred ten minutes apart satisfied the “same time” element of same criminal conduct).

Plechner was charged and convicted of assault in the third degree under RCW 9A.36.031(1)(d) and hit and run (injury) under RCW 46.52.020(4)(b). [CP 79-81].

For purposes of RCW 9.94A.589(1)(a), Plechner’s convictions for assault in the third degree and hit and run (injury) occurred at the same time, same place, involved the same victim (Holz), and the same objective intent as the assault furthered the hit and run (injury).

The trial court erred in failing to count the offenses here at issue as one crime for sentencing purposes and in the process miscalculated Plechner’s offender score, with the result that Plechner’s sentence must be reversed and remanded for recalculation of his offender score.

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05.2 Community Custody

A sentencing court “may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5); State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d 687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004) (the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Nothing in the statute grants the sentencing court the authority to speculate that a defendant will earn early release and to impose a sentence beyond the statutory maximum based on that speculation. If the Legislature had so intended, it would have made that provision.

In addition to sentencing Plechner to 50 months for hit and run (injury), count III, the trial court imposed 9 to 18 months’ community custody for assault in the third degree, count I. [CP 13]. As the sentence for each of the three counts for which Plechner was convicted is to be served concurrently, with the actual total confinement of 50 months, the sentence exceeds the statutory maximum sentence of five years imprisonment, or a \$10,000 fine, or both, for the offenses, [CP 30], with

the result that this court should remand for resentencing within the five-year statutory maximum for Plechner's convictions.

06. PLECHNER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THAT HIS CONVICTIONS FOR ASSAULT IN THE THIRD DEGREE AND HIT AND RUN (INJURY) ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES AND THAT THE COURT IMPOSED A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIMES OF CONVICTION.¹

Should this court find that trial counsel waived the issue relating to Plechner's offender score or the imposition of a sentence exceeding the statutory maximum by failing to object or by agreeing to his offender score and not arguing that his convictions for assault in the third degree and hit and run (injury), under the facts of this case, encompassed the same criminal conduct for sentencing purposes for the reasons set forth in the preceding section of this brief, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or

¹ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

strategic reason why trial counsel would have failed to properly object to Plechner's offender score and the imposition of the community custody duration for the reasons set forth in the preceding section, and had counsel done so, the trial court would not have miscalculated Plechner's offender score by counting both his conviction for assault in the third degree and hit and run (injury) in determining his offender score and would not have imposed a sentence exceeding the statutory maximum.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly objected to Plechner's offender score and the imposition of the community custody duration, the trial court would not have imposed a sentence in excess of what is statutorily permitted.

E. CONCLUSION

Based on the above, Plechner respectfully requests this court to reverse and dismiss his convictions and or to remand for resentencing consistent with the arguments presented herein.

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DATED this 22nd day of February 2006.

Respectfully submitted,

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CERTIFICATE

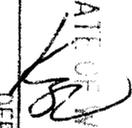
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