

No. 46134-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Adam Bouck,**

Appellant.

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Cowlitz County Superior Court Cause No. 13-1-00333-1

The Honorable Judge Stephen Warning

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Bouck was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel gave Mr. Bouck incorrect legal advice that prompted him to plead guilty and agree to an exceptional sentence.
3. The trial court erred by entering Finding of Fact No. 5.
4. The trial court erred by entering Finding of Fact No. 7.
5. The trial court erred by entering Finding of Fact No. 10.
6. The trial court erred by entering Finding of Fact No. 14.
7. The trial court erred by entering Finding of Fact No. 15.
8. The trial court erred by entering Finding of Fact No. 16.
9. The trial court erred by entering Finding of Fact No. 17.
10. The trial court erred by adopting Conclusion of Law 1.
11. The trial court erred by adopting Conclusion of Law 2.
12. The trial court erred by adopting Conclusion of Law 3.

**ISSUE 1:** The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel unreasonably gave Mr. Bouck erroneous legal advice which persuaded him to plead guilty and agree to an exceptional sentence. Was Mr. Bouck denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

13. Mr. Bouck's guilty plea to count three violated his Fourteenth Amendment right to due process.
14. Mr. Bouck's guilty plea to count three was not knowing, intelligent, and voluntary.

15. The record of the plea hearing does not establish a sufficient factual basis for Mr. Bouck's plea to third-degree assault as charged in count three.
16. The record of the plea hearing does not establish that Mr. Bouck assaulted Weitman.
17. The record of the plea hearing does not establish that Mr. Bouck acted with intent to prevent or resist the lawful apprehension or detention of himself.
18. The record of the plea hearing does not establish the lawfulness of Weitman's attempt to apprehend or detain Mr. Bouck.

**ISSUE 2:** A guilty plea is not knowing, intelligent, and voluntary if the record does not set forth an adequate factual basis for a finding of guilt. Here, the record of the plea hearing does not establish that Mr. Bouck assaulted Weitman, that Weitman's attempt to detain him was lawful, or that he acted with intent to prevent or resist a lawful apprehension or detention. Does the lack of an adequate factual basis require reversal of Mr. Bouck's guilty plea and dismissal of count three with prejudice?

19. Mr. Bouck's convictions for robbery (count one) and assault (count two) infringed his Fifth and Fourteenth Amendment prohibition against double jeopardy.
20. Mr. Bouck's robbery and assault convictions in counts one and two merged.

**ISSUE 3:** Convictions for robbery and assault merge for double jeopardy purposes if the underlying conduct shared the same purpose. Here, the same act and purpose supported Mr. Bouck's assault conviction and the robbery charge. Did the court violate the Fifth and Fourteenth Amendment prohibition against double jeopardy by entering convictions for both robbery and assault?

**ISSUE 4:** Multiple convictions violate double jeopardy if based on the "same evidence." Under the facts of this case, the evidence establishing the robbery conviction also established the assault charged in count two. Did the trial court violate

double jeopardy by entering judgment and imposing sentence for both robbery and assault?

21. The sentencing court failed to properly determine Mr. Bouck's offender score and standard range.
22. The sentencing judge erred by sentencing Mr. Bouck with an offender score of three.
23. The sentencing judge erred by failing to score counts one and two as the same criminal conduct.
24. The sentencing judge erred by (implicitly) concluding that Mr. Bouck's California conviction was comparable to Washington felonies.
25. The trial court erred by adopting Finding of Fact No. 2.1 (Judgment and Sentence), indicating that none of the current offenses comprised the same criminal conduct.
26. The trial court erred by adopting Finding of Fact No. 2.2 (Judgment and Sentence).
27. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

**ISSUE 5:** Two offenses are the same criminal conduct if they occurred at the same time and place, against the same victim, with the same overall criminal purpose. Here, counts one and two comprised the same criminal conduct, because Mr. Bouck assaulted Delzell to accomplish the robbery. Did the trial court err by scoring counts one and two separately when calculating Mr. Bouck's offender score?

**ISSUE 6:** An out-of-state conviction does not add a point to the offender score unless it is comparable to a Washington felony. Here, the court added one point to Mr. Bouck's offender score based on a California conviction for evading a police officer, a crime that is not equivalent to any Washington felony. Did the court err by adding a point to Mr. Bouck's offender score based on a non-comparable out-of-state conviction?

**ISSUE 7:** Courts are not bound by stipulations to matters of law. Here, Mr. Bouck purported to stipulate that his prior California conviction was comparable to a Washington felony. Did the trial court err by accepting an erroneous legal stipulation declaring that the California misdemeanor of evading a police officer is comparable to a Washington felony?

28. Defense counsel provided ineffective assistance by failing to argue that counts one and two comprised the same criminal conduct.
29. Defense counsel provided ineffective assistance by stipulating that Mr. Bouck's California conviction was comparable to a Washington felony.

**ISSUE 8:** An offender is entitled to the effective assistance of counsel at sentencing. Here, defense counsel improperly stipulated that Mr. Bouck's prior California conviction was comparable to a Washington felony, and failed to argue that counts one and two comprised the same criminal conduct. Did counsel's deficient performance prejudice Mr. Bouck?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Adam Bouck shoplifted from WalMart and security guard Delzell chased him. CP 11. When the guard caught him Mr. Bouck made a fist as if to hit him. CP 11. As he got to the parking lot, a person driving a sport-utility vehicle saw Mr. Bouck running out of the store. The driver, Weitman, stopped as if to let him pass. Then, when Mr. Bouck was directly in front of him, he accelerated and hit Mr. Bouck. Mr. Bouck got up and ran, chased now by the driver of the SUV. RP 8. The driver caught up to him and they confronted each other. Fearing for his safety, Mr. Bouck pulled out a knife and escaped. RP 8; CP 11.

The state charged Mr. Bouck with two counts of robbery 1 and theft in the third degree. One of the robbery counts included a deadly weapon enhancement and a “good samaritan” aggravator. CP 86.

Prior to trial, the state made an offer to Mr. Bouck. In exchange for a plea to two counts of robbery 2 and two counts of assault 3, the state would recommend an aggravated sentence of 34 months. RP 5; CP 3. Mr. Bouck’s standard range on the robbery charge was 13 to 17 months. RP 5; CP 4, 87. At no time during plea negotiations did the prosecution threaten to charge Mr. Bouck with second-degree assault. RP 86.

Mr. Bouck pled guilty. CP 3. In his plea form, he provided the following statement:

In Cowlitz County, on 3/9/13 I shoplifted from Walmart. When security stopped me I tried to break free and had a clenched fist showing a threat of force. I pushed security to break free. While fleeing, Mr. Weitman hit me with his car and chased me, so I pulled a knife. I give up self defense for benefit of the offer. CP 11.

Attached to the plea form was a copy of the “Amended Plea Agreement.” CP 15.

According to this document, Mr. Bouck “agrees that the Prosecutor’s Statement of the Defendant’s Criminal History is accurate and that all out-of-state convictions used to calculate the offender score are the equivalent of Washington felonies.” CP 15. The agreement also recited that Mr. Bouck agrees that his/her standard range is Score = 3 Range = Robbery – 13-17 months, Aslt 3 = 9-12 months.” CP 15. Finally, the agreement indicated that Mr. Bouck agreed to an exceptional sentence of 34 months. CP 15. Mr. Bouck’s attorney signed the agreement; Mr. Bouck did not. CP 15.

The court accepted the plea and sentenced Mr. Bouck to 34 months on May 23, 2013. RP 9, 16-17; CP 17. At this hearing, the state alleged

that Mr. Bouck had a prior conviction for “Evading a Police Officer.” CP 16. Mr. Bouck agreed that this was correct.<sup>1</sup> CP 4; RP 12-17.

On October 3, 2013, Mr. Bouck filed a *pro se* Motion to Withdraw Plea. CP 29-30. He argued that he’d pled guilty as a result of incorrect legal advice, and that two of the offenses to which he’d pled guilty should have merged. CP 29-30. He later filed a declaration indicating that he would have proceeded to trial if he’d received proper advice. CP 52-53.

The court appointed counsel to represent Mr. Bouck. Counsel filed additional pleadings, and the court held an evidentiary hearing. CP 31-51; RP 22, 30-88. The court heard testimony from the attorney who had represented Mr. Bouck at the plea hearing. RP 33-62.

Mr. Bouck’s former attorney testified that he was not aware that a robbery victim had to have possession of (or some other interest in) property stolen during a robbery. RP 36-37; CP 87. He had erroneously advised Mr. Bouck that he could be convicted of a robbery with respect to the driver of the SUV, and that he now knew his advice had been inaccurate. RP 36-41, CP 87. He also told Mr. Bouck that the state would

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<sup>1</sup> The “Amended Plea Agreement” indicated a stipulation that the prior offense was comparable to a Washington felony. CP 15. However, Mr. Bouck did not sign the Amended Plea Agreement. CP 15. Nor did he waive his constitutional right to a jury determination of any facts underlying the prior conviction. CP 15. Furthermore, any stipulation to a legal issue is not binding. *State v. Drum*, 168 Wn.2d 23, 33, 225 P.3d 237 (2010).

be able to amend the robbery charge to second-degree assault at any time prior to resting its case. RP 57.

Mr. Bouck testified that he knew that his range on the robbery 2 was 13 to 17 months, and that he understood that to be the sentence he faced upon pleading guilty. RP 63-88. Mr. Bouck testified that he wouldn't have pled guilty if he'd known that he couldn't be convicted of robbing Weitman. RP 73, 83; CP 87.

The court denied Mr. Bouck's motion to withdraw his plea. The judge found that Mr. Bouck was given inaccurate legal advice, but that he was not prejudiced. RP 100-103; CP 86-89. Mr. Bouck timely appealed. CP 90.

## **ARGUMENT**

### **I. MR. BOUCK SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS PLEA, BECAUSE HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS.**

#### **A. Standard of Review**

Constitutional issues are reviewed *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). A claim of ineffective assistance of counsel is also reviewed *de novo*. *In re Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014). Arguments not made to the trial court may be raised for the first time on review, because

ineffective assistance creates a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

- B. Mr. Bouck’s attorney unreasonably provided inaccurate legal advice regarding the risk of trial, and there is a reasonable probability that Mr. Bouck would have rejected the plea offer absent the incorrect advice.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). Faulty legal advice can render a guilty plea involuntary or unintelligent. *Id.* A defendant is entitled to withdraw his or her plea if counsel’s deficient performance caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, the defendant must establish a reasonable probability that he or she would not have pled guilty but for counsel’s error. *Sandoval*, 171 Wn.2d at 169.

To provide effective assistance, an attorney must “carry[ ] out the duty to research the relevant law.” *Kyлло*, 166 Wn.2d at 862. In this case, Mr. Bouck’s attorney failed to research the relevant law and provided erroneous legal advice. The incorrect advice prompted Mr. Bouck to plead guilty and to agree to an exceptional sentence.

1. Defense counsel erroneously told Mr. Bouck that he could be found guilty of first-degree robbery for his interaction with Weitman.

A conviction for robbery requires proof that the victim had some interest in (or dominion and control over) the stolen property. *State v. Tvedt*, 153 Wn.2d 705, 714, 107 P.3d 728 (2005).<sup>2</sup> A bystander who intervenes and is assaulted may be the victim of assault; she or he is not a robbery victim. *Id.*; *State v. Hall*, 54 Wash. 142, 102 P. 888 (1909).

Here, defense counsel told Mr. Bouck that he could be convicted of first-degree robbery as charged in count one of the original Information. Information, Supp. CP; RP 36-37, 73, 83. Prior to Mr. Bouck's guilty plea, the prosecutor believed this as well. CP 88.

This was incorrect. Weitman, the alleged victim in count one of the original charge, had no interest in the stolen property. Mr. Bouck could not have been convicted of robbery as originally charged in count one. *Tvedt*, 153 Wn.2d at 714.

Defense counsel's incorrect legal advice constituted deficient performance under *Strickland*. *Kyllo*, 166 Wn.2d at 862. The Supreme Court decided *Tvedt* long before Mr. Bouck's case arose. Defense counsel

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<sup>2</sup> Furthermore, a single taking from a store amounts to one count of robbery, regardless of how many store employees are present. *Id.*, at 716.

should have known that Mr. Bouck was not liable for robbery as originally charged in count one.

2. Defense counsel erroneously told Mr. Bouck the state could amend the information to charge second-degree assault at any time before the state rested.

The prosecution “may not amend a criminal charging document to charge a different crime after the State has rested its case unless the amended charge is a lesser degree of the same charge or a lesser included offense.” *State v. Dallas*, 126 Wn.2d 324, 327, 892 P.2d 1082 (1995).<sup>3</sup> An offense is an “included offense” if each element of the included offense is a necessary element of the greater crime, and the evidence supports an inference that only the lesser crime was committed. *State v. Nguyen*, 165 Wn.2d 428, 434-35, 197 P.3d 673 (2008) (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978)).

Second-degree assault is not a lesser-included offense of first-degree robbery. Under the facts of this case, relevant means of committing second-degree assault include intentional assault accompanied by reckless infliction of substantial bodily harm, assault with a deadly weapon, or assault with intent to commit a felony. *See* RCW 9A.36.021.

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<sup>3</sup> Furthermore, the mandatory joinder rule operates to bar prosecution on a charge related to offenses already tried. CrR 4.3.

All three relevant means require an actual assault. RCW 9A.36.021. However, as originally alleged, count one charging first-degree robbery did not require proof of an assault. Information, Supp. CP; RCW 9A.56.190; RCW 9A.56.200(1)(a)(i), (ii). Instead, to obtain a conviction for robbery, the state was required to prove only that Mr. Bouck *threatened* the use of force, violence, or fear of injury, and was armed with or displayed a deadly weapon. Information, Supp. CP; RCW 9A.56.190; RCW 9A.56.200(1)(a)(i), (ii). Second-degree assault therefore fails the legal prong of the *Workman* test. *See State v. Herrera*, 95 Wn. App. 328, 332, 977 P.2d 12 (1999).

Accordingly, once the trial started, the prosecution could not have amended the robbery charge to second-degree assault, even if it sought to do so prior to resting its case. *Dallas*, 126 Wn.2d at 327. The state would not have had the power to amend the charge to third-degree assault. *Herrera*, 95 Wn. App. at 332. Defense counsel's advice was therefore erroneous, and constituted deficient performance. *Kyllo*, 166 Wn.2d at 862.

C. Counsel's deficient performance prejudiced Mr. Bouck.

If Mr. Bouck had proceeded to trial, he faced conviction on only one felony: first-degree robbery as originally charged in count two. This is so because count one (as originally charged) would not have survived a

motion to dismiss at the close of the state's case.<sup>4</sup> *Tvedt*, 153 Wn.2d at 714. With only one prior offense,<sup>5</sup> his standard range would have been 36-48 months. RCW 9.94A.525. Furthermore, he would not have been subject to the "Good Samaritan" aggravator, which was only attached to the improperly charged count. Information, Supp. CP; RCW 9.94A.535(3)(w). Accordingly, the state would have been unable to request an exceptional sentence.

Instead, however, his attorney erroneously told him he was facing a possible life sentence,<sup>6</sup> that his standard range was 60-85 months,<sup>7</sup> that the state could amend the charge to second-degree assault even after trial commenced, and that he'd face the same sentence if convicted of that offense.<sup>8</sup> RP 36, 38-39, 41, 42, 57; CP 52-53, 86-89; RCW 9.94A.525. None of these assertions was true.

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<sup>4</sup> Contrary to the trial court's suggestion, competent counsel would not have filed a motion to dismiss prior to trial. CP 88. Such a motion would have prompted the state to amend the charges prior to trial. A pre-trial amendment to assault was permissible as long as the defendant's rights were not prejudiced. CrR . After the start of trial, a motion to dismiss could only have resulted in amendment to a lesser-included offense. *Dallas*, 126 Wn.2d at 327. The facts here do not support any lesser included offense other than brandishing a weapon. RCW 9.41.270(1).

<sup>5</sup> Had he not pled guilty, Mr. Bouck would have had the opportunity to contest the existence and comparability of his prior California conviction. CrR 4.2(e); CP 15.

<sup>6</sup> The state did not allege any aggravating factors, other than the one attached to the improperly charged robbery. Information, Supp. CP.

<sup>7</sup> Including the 24 month deadly weapon enhancement alleged as part of count one. Information, Supp. CP; RCW 9.94A.533(4).

<sup>8</sup> In fact, the total sentence would have been reduced by 12 months because a lower deadly weapon enhancement would have applied. RCW 9.94A.533(4).

Mr. Bouck affirmed in writing and in his testimony that he would have rejected the 34 month offer if he hadn't been misled by his attorney. CP 52-53, 87; RP 73, 83. This would have been entirely reasonable. Following trial, his sentence would not have exceeded 48 months. Furthermore, he might have prevailed at trial, or might have succeeded in getting convicted of a lesser charge than the robbery originally charged in count two. At sentencing, he could have disputed his prior California conviction, and could also have argued for a sentence at the low end of the range, a mere two months longer than the 34 month agreed exceptional sentence imposed pursuant to the plea bargain. CP 6, 15.

There is a reasonable probability that Mr. Bouck would not have proceeded to trial if his counsel had advised him properly. *Sandoval*, 171 Wn.2d at 169. His convictions must be reversed, and the charges remanded for trial. *Id.*

**II. THE COURT MUST VACATE THE CONVICTION ON COUNT THREE AND DISMISS THE CHARGE WITH PREJUDICE, BECAUSE THE RECORD DOES NOT CONTAIN A SUFFICIENT FACTUAL BASIS FOR THE PLEA.**

A. Standard of Review

Constitutional issues are reviewed *de novo*. *LK Operating*, 181 Wn.2d at 66. The state bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Arguments

regarding the validity of a guilty plea may be raised for the first time on review. RAP 2.5(a)(3); *State v. Walsh*, 143 Wn.2d 1, 6, 17 P.3d 591 (2001).<sup>9</sup>

B. Mr. Bouck's guilty plea to count three was involuntary because the record does not affirmatively establish that he understood the law, the facts, and the relationship between the two.

Due process requires an affirmative showing that an accused person's guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *In re Stockwell*, 179 Wn.2d 588, 594, 316 P.3d 1007 (2014); *Ross*, 129 Wn.2d at 284.

The record of a plea hearing must prove that the accused person understood the law, the facts, and the relationship between the two:

A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements... Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea.

*State v. R.L.D.*, 132 Wn. App. 699, 706, 133 P.3d 505 (2006). The facts must be made a part of the record at the plea hearing. *Id.*, at 706 n. 8.

A guilty plea is not voluntary if it is not supported by sufficient factual basis. *State v. S.M.*, 100 Wn. App. 401, 414, 996 P.2d 1111

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<sup>9</sup> See also *In re Toledo-Sotelo*, 176 Wash. 2d 759, 770, 297 P.3d 51, 56 (2013) (challenge to a guilty plea may be raised for the first time in a personal restraint petition).

(2000). The factual basis must be developed on the record at the time the plea is taken. *S.M.*, 100 Wn. App. at 415 (citing *In re PRP of Keene*, 95 Wn.2d 203, 210, 622 P.2d 360 (1981)).

The factual basis for a plea is insufficient if it fails to satisfy all the elements of the offense. *R.L.D.*, 132 Wn. App. at 706. Failure to sufficiently develop facts on the record at the time of the plea requires vacation of the conviction and dismissal of the charge with prejudice. *Id.* When the court relies on the accused's written statement on plea of guilty as the factual basis for the plea, it must "insure the facts admitted amount to the violation charged." *S.M.*, 100 Wn. App. at 414.

In this case, Mr. Bouck's guilty plea to count three (third-degree assault) violated his Fourteenth Amendment right to due process. This is so because the record does not establish that he understood the law, the facts, and the relationship between the two.

A person is guilty of third-degree assault if he assaults another "[w]ith intent to prevent or resist... the lawful apprehension or detention of himself." RCW 9A.36.031(1)(a) (emphasis added). A store's employee or agent<sup>10</sup> may lawfully detain a suspected shoplifter "in a reasonable

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<sup>10</sup> An agency relationship is established only if both parties consent to the relationship, and the principal retains the right to control the manner of performance. *State v. Garcia*, 146 Wn. App. 821, 828, 193 P.3d 181 (2008).

manner.” RCW 9A.16.080.<sup>11</sup> A person who is not an agent may not apprehend or detain another person pursuant to RCW 9A.16.080. *Garcia*, 146 Wn. App. at 828.<sup>12</sup>

An assault is

an intentional touching of another person that is harmful or offensive. An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed) (certain bracketed material omitted).

In his statement on plea of guilty, Mr. Bouck outlined the facts supporting count three as follows: “[w]hile fleeing, Mr. Weitman hit me with his car and chased me, so I pulled a knife.” CP 11. This statement does not make any mention of the requirement that the state prove intent to prevent lawful apprehension. RCW 9A.36.031(1)(a). It does not show that Weitman attempted to make a lawful apprehension. RCW 9A.16.080. *Garcia*, 146 Wn. App. at 828. Nor does it show that Mr. Bouck actually

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<sup>11</sup> See also RCW 4.24.220, protecting a shopkeeper’s agent from civil liability.

<sup>12</sup> A private citizen may make an arrest for a felony (or a misdemeanor that is a breach of the peace), but only upon probable cause and only if the offense is committed in her or his presence. *Garcia*, 146 Wn. App. at 829; *State v. Jack*, 63 Wn.2d 632, 388 P.2d 566 (1964).

assaulted Weitman, since it makes no mention of a touching, an act done with intent to inflict bodily injury, or an act done with intent to create apprehension and fear of bodily injury. *See* WPIC 35.50.

Similarly, the record of Mr. Bouck's colloquy with the court does not reflect an understanding of the law, the facts, and the relationship between the two. RP 3-10. Thus, neither the written plea statement nor the transcript show a sufficient factual basis for the guilty plea. CP 11; RP 2-10.

Mr. Bouck's plea to count three was involuntary. *R.L.D.*, 132 Wn. App. at 706. His conviction must be reversed and the case remanded to the juvenile court. *Id.*

### **III. CONVICTIONS FOR COUNTS ONE AND TWO INFRINGE MR. BOUCK'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.**

#### **A. Standard of Review.**

The issue of whether two convictions merge for double jeopardy purposes is reviewed *de novo*. *State v. Chesnokov*, 175 Wn. App. 345, 349, 305 P.3d 1103 (2013). Double jeopardy issues can be raised for the first time on appeal. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000); RAP 2.5(a)(3).

B. Mr. Bouck's robbery and assault convictions merge for double jeopardy purposes.

The state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. Whether two offenses are the same is "ultimately 'a question of statutory interpretation and legislative intent.'" *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014) (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). Courts first determine "if the applicable statutes expressly permit punishment for the same act or transaction." *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). If there is no express statutory provision permitting (or disallowing) punishment for the same act, the crimes are analyzed under the "same evidence" test. *Id.*

Under the "same evidence" test, multiple convictions violate double jeopardy if the evidence necessary to convict on one offense is sufficient to convict on the other. *In re Orange*, 152 Wn. 2d 795, 816, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). The test does not rest on a comparison of the legal elements of each offense. *Hughes*, 166 Wn.2d at 684. Convictions for two crimes can violate double jeopardy even if the two offenses do not have the same elements. *Id.*; *Orange*, 152 Wn.2d at 820.

Instead, the inquiry focuses on the evidence the state produced to prove each offense. *Orange*, 152 Wn.2d at 818-820. If the evidence necessary to convict the accused person on one offense also proves guilt on the other, the double jeopardy clause prohibits convictions for both.<sup>13</sup> *Orange*, 152 Wn.2d at 816; *see also In re Francis*, 170 Wn.2d 517, 525, 242 P.3d 866 (2010).

Here, the evidence used to convict Mr. Bouck of robbery also proved guilt on the assault charge. The state charged Mr. Bouck with robbery based on his struggle with Delzell. CP 1-2. In his guilty plea to the robbery, Mr. Bouck acknowledged that he struggled with and hit “security.” This same statement provided the basis for his assault charge in count two. CP 11. The conduct comprising the assault charge had no purpose independent from that comprising the robbery charge. *Chesnokov*, 175 Wn. App. at 350; *Francis*, 170 Wn.2d at 525. The robbery and assault convictions merge for double jeopardy purposes. *Id.*

Under the facts of this case, the trial court should not have entered convictions for both robbery and assault. *Francis*, 170 Wn.2d at 525. The conviction in count two must be vacated and the case remanded for a new sentencing hearing. *Id.*

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<sup>13</sup> Put another way, “[i]f each offense includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not constitutionally the same.” *Hughes*, 166 Wn.2d at 682.

**IV. THE COURT IMPROPERLY CALCULATED MR. BOUCK’S OFFENDER SCORE.**

A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

B. Mr. Bouck’s convictions for robbery (count one) and assault (count two) comprised the same criminal conduct and should have been scored as one point.

A sentencing court must determine the defendant’s offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

In determining whether multiple offenses require the same criminal intent, the sentencing court ““should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next....”” *State v. Garza-Villarreal*, 123 Wn.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

The burden is on the defense to establish facts showing that two offenses comprise the same criminal conduct. Here, the record shows that counts one and two should have scored as a single offense.<sup>14</sup>

Here, Mr. Bouck struggled with and assaulted Delzell to accomplish the robbery. CP 11. This interaction gave rise to count one (robbery) and count two (assault of Delzell). CP 1-2. The two offenses occurred at the same time and place against the same victim. CP 11. They involved the same overall criminal purpose: escaping from the store after stealing property. Accordingly, they comprised the same criminal conduct under RCW 9.94A.589.

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<sup>14</sup> In the alternative, the offenses should have merged, as argued elsewhere in this brief.

Although Mr. Bouck stipulated to an offender score of three, courts are not bound by any stipulation to an issue of law. *Drum*, 168 Wn.2d at 33. Accordingly, the trial judge should have exercised his discretion and found that counts one and two comprised the same criminal conduct. The two offenses should have added only one point to Mr. Bouck's offender score. RCW 9.94A.589; *Garza-Villarreal*, 123 Wn.2d at 46-47.

- C. Mr. Bouck's California conviction for evading a police officer should not have added a point to his offender score because it is not comparable to any Washington felony.

For sentencing purposes, prior out-of-state convictions are classified according to their Washington equivalents, if any. RCW 9.94A.525(3). An out-of-state conviction may not be used to increase an offender score unless it is comparable to a Washington felony. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Comparability questions present issues of law. *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014).<sup>15</sup>

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v.*

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<sup>15</sup> Accordingly, comparability questions are reviewed *de novo*. *Id.*

*Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the out-of-state statute are broader than its Washington counterpart, it would “(at least) raise serious Sixth Amendment concerns” to attempt to discern the underlying facts that were not found by a court or jury.

*Descamps v. United States*, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013) *reh'g denied*, 11-9540, 2013 WL 4606326 (2013).

Here, the state alleged that Mr. Bouck had a prior conviction for “Evading a Police Officer.” CP 18. Mr. Bouck agreed that this was correct.<sup>16</sup> CP 4.

The offense is criminalized by Cal. Veh. Code §2800.1, which is captioned “Flight from pursuing peace officer.” A person is guilty of the offense if she or he willfully flees or otherwise attempts to elude a pursuing police officer while operating a motor vehicle. Cal. Veh. Code §2800.1(a).<sup>17</sup> The crime is a misdemeanor. Cal. Veh. Code §2800.1. It

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<sup>16</sup> The “Amended Plea Agreement” indicated a stipulation that the prior offense was comparable to a Washington felony. CP 15. However, Mr. Bouck did not sign the Amended Plea Agreement. CP 15. Nor did he waive his constitutional right to a jury determination of any facts underlying the prior conviction. CP 15. Furthermore, any stipulation to a legal issue is not binding. *Drum*, 168 Wn.2d at 33.

<sup>17</sup> The pursuing officer must be in a marked car, exhibiting at least one lighted red lamp visible from the front, and sounding a siren if “reasonably necessary.” Cal. Veh. Code §2800.1.

does not require proof of reckless driving or danger to persons or property.  
Cal. Veh. Code §2800.1.<sup>18</sup>

The only potentially comparable Washington felony is attempting to elude a pursuing police vehicle, RCW 46.61.024. That offense requires proof that the offender drove “in a reckless manner.” RCW 46.61.024. Since the California misdemeanor (“evading a police officer”) does not require proof of reckless driving, the two offenses are not comparable.

Because the two offenses are not comparable, the sentencing court should not have included the California offense in Mr. Bouck’s offender score. *Thiefault*, 160 Wn.2d at 415. His sentence must be vacated and the case remanded for a new sentencing hearing with a corrected offender score. *Id.*

D. If Mr. Bouck’s sentencing arguments are not preserved, he was denied the effective assistance of counsel.

An accused person is entitled to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013). If Mr. Bouck’s sentencing arguments are not preserved for review, then he was denied the effective assistance of counsel, both at his

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<sup>18</sup> California does have other related offenses that do require reckless driving. For example, a person who evades a police officer pursuant to §2800.1 and who drives “in a willful or

sentencing hearing and at the hearing on his motion to withdraw his plea. *Phuong*, 174 Wn. App. at 548.

Competent counsel would have pointed out that counts one and two comprised the same criminal conduct, and that the California conviction was not comparable to a Washington felony. *Id.* Mr. Bouck was prejudiced because proper argument would have resulted in an offender score of one, rather than three. *Id.* His sentence must be vacated and the case remanded for a new sentencing hearing with a corrected offender score. *Id.*

### **CONCLUSION**

Mr. Bouck's guilty pleas must be set aside. Count three must be dismissed with prejudice. The case must be remanded for a new trial.

Even if the guilty pleas are upheld, Mr. Bouck's conviction on count two must be vacated because it merges with the conviction in count one.

Alternatively, counts one and two comprise the same criminal conduct. Furthermore, the trial court should not have included Mr. Bouck's California conviction in his offender score. The sentence must be

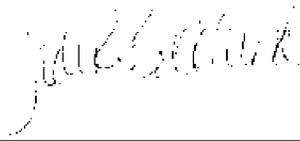
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wanton disregard for the safety of persons or property" may be found guilty of a gross misdemeanor. Cal. Veh. Code §2800.2.

vacated and the case remanded to the trial court for a new sentencing hearing with a corrected offender score.

Respectfully submitted on December 2, 2014,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Adam Bouck, DOC #366483  
Cedar Creek Corrections Center  
PO Box 37  
Littlerock, WA 98556

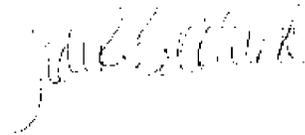
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney  
bours@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 2, 2014.



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Jodi R. Backlund, WSBA No. 22917  
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## BACKLUND & MISTRY

December 02, 2014 - 3:52 PM

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