

NO. 49443-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD J. STEINER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

The Honorable Stephen Brown, Judge, and
The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The appellant was denied his right to the effective assistance of counsel guaranteed by the United States Sixth Amendment and article I, section 22 of the Washington Constitution.

2. Trial counsel was ineffective by failing to argue that disarming a law enforcement officer by taking her Taser (Count 2), and assault of the officer by use of the Taser (Count 1) constituted the same criminal conduct, and by failing to object to inclusion of Mr. Steiner's 2015 Colorado conviction for attempted second degree assault in the calculation of the offender score.

3. The trial court erred by including a 2015 Colorado conviction for attempted assault in the second degree (bodily fluids) in Mr. Steiner's offender score, where the State did not prove the conviction were comparable to a Washington felony.

4. The trial court erred in finding Mr. Steiner competent to stand trial and by failing to order a second competency evaluation.

5. The trial court erred in entering the following unnumbered finding of fact regarding Mr. Steiner's competency:

The court finds that the presumption that the defendant is competent has not been overcome by the preponderance of the evidence.

Clerk's Papers (CP) 30.

6. The trial court erred in entering the following unnumbered finding of fact regarding Mr. Steiner's competency:

The defendant has the capacity to understand the nature of the proceedings against him/her and to assist in his/her own defense.

CP 30.

7. The trial court erred in entering the following conclusion of law regarding appellant's competency:

The defendant is competent to proceed to trial in this matter.

CP 31.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment and article I, § 22 of the Washington Constitution guarantee an accused person the right to the effective assistance of counsel. Did defense counsel provide ineffective assistance by failing to argue the acts used by the State to obtain convictions for third degree assault against a law enforcement officer and disarming the law enforcement officer, both of which occurred nearly instantaneously during the same continuing event against the same officer, constituted the same criminal conduct? Assignments of Error No. 1 and 2.

2. In determining the defendant's offender score under the Sentencing Reform Act of 1981 ("SRA"), the State bears the burden of proving the

existence and comparability of prior out-of-state convictions. The trial court included in Mr. Steiner's offender score a prior Colorado conviction for attempting to commit assault in the second degree (attempting to spit on an officer in a detention facility), but an examination of the elements of this offense and factual basis for the conviction reveals that it is more comparable to attempted custodial assault in Washington, a gross misdemeanor. Did the trial court err in including the Colorado conviction in Mr. Steiner's offender score? Assignment of Error No. 3.

3. Did Mr. Steiner receive ineffective assistance of counsel where the State did not prove the Colorado conviction was legally and factually comparable to a Washington felony and his attorney did not object to inclusion of the out-of-state conviction in the offender score? Assignment of Error No. 3.

4. To be competent to stand trial, the accused person must be able to understand the nature of the charges against him and assist in his own defense. Following a competency evaluation, a psychologist from Western State Hospital evaluated the appellant and filed a report concluding that he was competent to proceed to trial and to assist in his defense. The trial court entered an order finding that Mr. Steiner understood the nature of the charges and was capable of assisting in his defense. Where the evidence at trial shows

Mr. Steiner was unable to rationally assist his attorney in his defense, believed that a police video of the incident was fabricated or altered, and believed that other videos of the incident existed but were withheld from him, did the trial court abuse its discretion in failing to order a second evaluation to determine if Mr. Steiner was competent to stand trial? Assignments of Error No. 4, 5, 6, and 7.

C. STATEMENT OF THE CASE

1. Procedural history:

Edward Steiner was charged in Grays Harbor County Superior Court with one count of third degree assault and one count of disarming a law enforcement officer. Clerk's Papers (CP) 1-3; RCW 9A.36.031(1)(g), (h); RCW 9A.76.023(1); Appendix A. The State alleged that in Aberdeen, Washington on February 4, 2016, Mr. Steiner took a projectile stun gun (Taser) from Kristi Loughheed, a police officer for the Aberdeen Police Department, and assaulted her with her Taser. CP 1-2.

a. *Competency proceeding*

On April 25, 2016, defense counsel informed the court that he thought that Mr. Steiner could be incompetent to stand trial and that he was not able to

assist in his own defense. Report of Proceedings (RP)¹ (4/25/16) at 11-13. The trial court granted the request and entered an order for competency evaluation, to be performed at the Grays Harbor County Jail. CP 19-25.

Dr. Christopher Cadle, a licensed psychologist at Western State Hospital, interviewed Mr. Steiner at the jail and found him to be competent to stand trial. 1RP at 15. The trial court did not conduct a formal evidentiary hearing to determine Mr. Steiner's competency; instead the court entered an agreed order of competency handed up by defense counsel and prosecutor on May 9, 2016, finding that Mr. Steiner was competent to stand trial and that he has both the ability to understand the proceedings against him and to assist in his defense. CP 30-31; 1RP at 15. The trial court entered written findings of fact and conclusions of law stating that "[t]he defendant has the capacity to understand the nature of the proceedings against him/her and to assist in his/her defense." CP 30-31. The court concluded "[t]he defendant is competent to proceed in this matter." CP 31. The case proceeded to trial after a change of defense attorneys. 1RP at 21.

Prior to trial, Mr. Steiner wrote a *pro se* motion to the court addressing

¹The Verbatim Report of Proceedings consists of the following volumes designated as follows: 1RP (2/29/16), (3/28/16), (4/11/16), (4/25/16), (5/9/16), (5/16/16), (5/25/16), (6/20/16), (8/9/16, jury trial, day 1); 2RP (8/9/16, jury trial, day 1, afternoon session), (8/10/16, jury trial, day 2); RP (2/22/16), (8/1/16); and (9/9/16, sentencing).

the potential destruction of videos in what he titled Motion for Evidence to Be Held, Video Audio and Personal Property, also GPS, Dispatch Records, filed March 7, 2016. CP 13. In his motion, Mr. Steiner requested video of the incident on February 4, 2016, as well as videos that he believed existed at SeaMar Community Health Center in Aberdeen, the Grays Harbor Community Hospital, test results from blood samples from the arresting officer Kristi Lougheed, and video from the Aberdeen City Jail and Grays Harbor County Jail. CP 13.

Mr. Steiner also wrote several letters to the court complaining of lack of evidence being provided to him and other issues. On July 20, 2016, Mr. Steiner wrote a letter to Judge David Edwards stating that the police video of the incident provided to his attorney had video and audio material “either taken out or added in,” and requested that the video be kept in a safe place to prevent “further tampering.” CP 44. In a two-page letter to Judge Edwards on July 26, 2016, Mr. Steiner again alleged that he was not provided with all videos of the incident and that video had been lost or destroyed. CP 46-47.

2. Trial testimony:

The matter came on for jury trial on August 9 and 10, 2016, the Honorable David Edwards presiding. 1RP at 31-228, 2RP at 234-350.

Aberdeen police officer David Tarrence responded to a report of a guest

refusing to leave a motel in Aberdeen after being required to leave by staff for smoking on February 4, 2016. 1RP at 129. Officer Kristi Lougheed responded to the call as a backup officer. 1RP at 129. After arriving police contacted Edward Steiner, the room occupant. 1RP at 130. Mr. Steiner agreed to leave and stated that he was going to call a taxi. 1RP at 130. Officer Tarrence called dispatch, which in turn called a local taxi company to pick up Mr. Steiner. 1RP at 130. After approximately fifteen minutes Officer Lougheed cleared the scene, but shortly afterward she was dispatched to the taxi, which was now located in a parking lot of a Dairy Queen in Aberdeen. 1RP at 130. The taxi driver reported that the fare -Mr. Steiner- refused to leave the taxi. 1RP at 130.

Mr. Steiner told Officer Lougheed that he had a medical appointment at SeaMar Community Health Center that day and wanted the taxi to take him there. 1RP at 131. The taxi driver then transported him to SeaMar, which was “right around the corner” from the Dairy Queen parking lot. 1RP at 131. Officer Lougheed followed the taxi, and after it arrived at SeaMar, helped him get his possessions out of the taxi and assisted him in carrying his luggage to the SeaMar waiting room. 1RP at 132-33.

After checking with the reception desk at SeaMar, Officer Lougheed learned that Mr. Steiner’s appointment was for the following day. 1RP at 134.

Officer Lougheed then helped Mr. Steiner take his possessions outside and put them in her patrol car and offered to take him to a motel that was located approximately one block away so that he would be able to walk to SeaMar for his appointment the next morning. 1RP at 134. After transporting him to the nearby motel, Mr. Steiner said that he would not stay there, so she drove him to the next closest motel, and again he refused to stay there. 1RP at 135-36. She then drove him to an Econo Lodge, and as she pulled into the motel parking lot, he said that "there was a demon present and he would not stay there." 1RP at 137. He requested to be taken back to a bus stop near SeaMar, and she drove him there. 1RP at 137. After underloading his baggage, she stated that he made statements that caused her to believe that he would return to SeaMar and cause problems. 1RP at 138. She stated that his behavior "seemed to be ramping up a little bit like he was getting angry." 1RP at 138. She stated that as they got to SeaMar he said "I'm a cop killer. Don't you know that. I'm a cop killer." 1RP at 140.

After letting him out of her patrol vehicle the officer pulled into an alley behind SeaMar and determined if Mr. Steiner had an out of county warrant. 1RP at 140. While she observed him, he remained in the parking lot "just staring," and then appeared to be yelling at people in a nearby open garage. 1RP at 141. She drove back to the parking lot and told him to stop yelling and

that he was being disorderly. 1RP at 142. Officer Lougheed stated that Mr. Steiner then offered her drugs and called her names. 1RP at 143. She felt that his behavior was escalating and that dispatch was going to get more calls about his behavior and that he was going to possibly assault someone. 1RP at 144. The officer then got out of her car with the intent to arrest him for disorderly conduct. 1RP at 144. She told him to turn around and she put her hand on his arm and he yanked his arm away and shoved her on the chest. 1RP at 145. She testified that she drew her Taser and he pulled away a second time as she tried to handcuff him, at which time she fired the Taser, but both probes did not make contact with him and a circuit was not established. 1RP at 155. She then attempted to place the Taser itself on his stomach to create a completed circuit, but stated that he grabbed the Taser from her hand and touched her arm with it, shocking her. 1RP at 157. She grabbed it back and put it on his thigh, which knocked him to the ground. 1RP at 157.

Officer Lougheed called for other officers and then told him that if he continued to resist she was going to use the Taser again. 1RP at 158. She stated that that he continued to resist and she pulled the trigger again, shocking him, and he was then taken into custody. 1RP at 158. The State introduced video of the event from a recording unit in Officer Lougheed's patrol vehicle, which was played to the jury. 1RP at 166, 170. Exhibit 1.

Mr. Steiner denied that he took the Taser from Officer Lougheed and denied that he used the Taser to shock the officer. 2RP at 269, 275. During his testimony, Mr. Steiner asked several times that the police video be played again. 2RP at 271-72. The video was played and as it played, he said that “something is wrong with this video,” and that the time did not match with the dispatch. 2RP at 272.

Mr. Steiner made several statements regarding obtaining videos of the incident from other sources. He also stated that the video from the officer’s vehicle was altered, and inexplicably insisted that Officer Lougheed was wearing a “bombardier jacket” during the incident, despite the video, which showed she was wearing a standard police uniform at the time of the incident. 2RP at 277. Mr. Steiner also insisted that no photos were taken of his injuries at the Aberdeen City Jail, despite photographs of his hands taken at the jail. 2RP at 280. He denied that he offered drugs to Officer Lougheed and denied that he said “you’re serving up on regular basis, bitch,” after being told “no” by the officer, despite the audio recording to the contrary. 2RP at 281-82. Regarding these discrepancies, the prosecutor asked Mr. Steiner the following:

Q: You didn’t say that?

A: No, I did not.

Q: It’s on the video, but it didn’t happen; is that right?

A: Like I was trying to say, we need to watch the whole video. We need to watch the video again, because it also shows her handling that

Taser and I believe that—

Q: No.

A: —I haven't seen—

Q: No. We'll get to that in a minute. My —my question is, the video shows that, but you say you didn't say it, correct?

A: Excuse me.

Q: The video—on the video you can be heard saying that, but your testimony is that you didn't say that, correct?

A: I—my testimony is the video has been tampered with and the times don't match up with none of the dispatch reports and the tase times don't match either and the jury needs to see that.

Q: So you're saying that the video has been altered by somebody?

A: It's been altered some way, shape or form, fabricated, something.

Q: Okay.

A: We don't even have the whole video. Where is all the rest of the video? Where is the Harner video? Where is the Dairy Queen video? Where is that video when they pulled into the motel? Where is all of the video?

Q: Now—

A: I need it. I—I want the jury to see it.

2RP at 282-83.

During closing argument, the State attempted to dismiss the issues of

Mr. Steiner's competency that were revealed during trial:

And I would be remiss if I didn't touch upon something briefly. Some of you may have come to the conclusion that the defendant suffers from mental illness. Okay. I don't know. We don't know. There's been no testimony about that. That issue not on the table right now. All right. There's a lot that goes into those determinations. There's mental illness, like schizophrenia and bipolar, and there's personality disorder, this and that. None of us have the expertise to make - or the information to make those judgments today. That's off to one side. The only question is did he assault her, was it with a Taser, projectile stun gun, and did he disarm her.

2RP at 320-21.

During allocution, Mr. Steiner, instead of addressing the issue sentencing, instead spoke about the artwork in the courthouse mixed with allusions to the Bible and the necessity of avoiding evil, and then again returned to his contention that evidence was “destroyed or tampered with.” RP (9/9/16) at 13-17. Mr. Steiner’s remarks were written beforehand, which he read aloud in court. After reading for several minutes, the court stopped him, at which point Mr. Steiner noted “Jesus was homeless too.” RP (9/9/16) at 17.

When sentencing Mr. Steiner, the court noted “[t]o the extent that a finding by this Court that there are mental health issues will facilitate mental health treatment of Mr. Steiner while he is incarcerated, I will make such a finding. **It is clear to the Court from the evidence in this case and Mr. Steiner’s conduct in court that there are mental issues.**” RP (9/9/16) at 19. (Emphasis added).

3. Verdict and sentencing:

The jury found Mr. Steiner guilty of third degree assault contrary to RCW 9A.36.031(1)(g) and RCW 9A.76.023(1). 2RP at 338-39; CP 89, 91, 104.

At sentencing the State presented evidence of Mr. Steiner’s prior convictions for attempted second degree assault (bodily fluids) in Colorado in 2015 and for second degree arson in Nevada. CP 94-100. Defense counsel,

however, did not object to the State's calculation of the offender score at "6" points and conceded that the crimes were comparable to the Washington felonies of second degree arson and custodial assault. RP (9/9/16) at 9-13.

The trial court accepted the State's calculation of Mr. Steiner's offender score, and based on an offender score of "6," imposed 29 months followed by 12 months of community custody. RP (9/9/16) at 18; CP 107, 109. The court ordered legal financial obligations of \$500.00 crime victim assessment, \$200.00 court costs, and a \$100.00 DNA fee. RP (9/9/16) at 18; CP 110, 111.

Timely notice of appeal was filed September 9, 2016. CP 116-18. This appeal follows.

D. ARGUMENT

1. THE CONVICTIONS FOR THIRD DEGREE ASSAULT AND DISARMING A LAW ENFORCEMENT OFFICER CONSTITUTED THE SAME CRIMINAL CONDUCT FOR CALCULATION OF THE OFFENDER SCORE

The convictions for third degree assault and disarming a law enforcement officer were part of the same criminal conduct, but defense counsel did not make the argument at sentencing, but instead conceded to an offender score of "6." Because such an argument would have resulted in a lowered offender score and reduced standard range, Mr. Steiner received

ineffective assistance of counsel.

a. The State and Federal constitutions guarantee an accused person the effective assistance of counsel.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the U.S. Const. amends. VI; and Article I, § 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability the result of the proceeding would have been different. Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. *Thomas*, 109 Wn.2d at 226.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Thomas*, 109 Wn.2d at 226. Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal. *State v. Ermert*, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see *State v. Jackson*, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (failing to raise same criminal conduct before sentencing court waives argument challenging offender score), review denied, 167 Wn.2d 1007 (2009); *State v. Allen*, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (reaching ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing), review denied, 170 Wn.2d 1014 (2010); *State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) ("counsel's decision not to argue same criminal conduct as to the rape and kidnapping charges constituted ineffective assistance of counsel").

b. Counsel's failure to argue that both counts constituted the same criminal conduct was deficient performance

A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score is reviewed for an abuse of discretion or misapplication of the law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard and it is based on untenable reasons if it is based on an incorrect

standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997).

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

[W]henever 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" is defined as "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). The test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

The offenses occurred at the same time and place and involved the same victim. Moreover, the criminal intent was the same for both crimes because Mr. Steiner committed the act of taking the Taser from the officer's hand and using it to shock her to further his goal of not being taken into custody. IRP at 144.

In determining criminal intent, "[t]he standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The test is objective; a court must consider how closely related the crimes committed are, and whether the criminal goals substantially changed between the crimes charged. *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Another question is whether one crime furthered the other. *Id.*

i. The incident involved the same victim and took place nearly simultaneously.

Starting with the time and place element, our Supreme Court has recognized that "the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct." *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); see *State v. Williams*, 135 Wn.2d 365, 368-69, 957 P.2d 216 (1998) (sale of 10 rocks of cocaine to one police informant, followed immediately and without interruption by same transaction with second informant, were same criminal conduct); *State v. Porter*, 133 Wn.2d 177, 183,

186, 942 P.2d 974 (1997) (rejecting "simultaneity" requirement, Court finds immediate, uninterrupted, sequential sales of methamphetamine and marijuana to same undercover officer occurred at same time); *State v. Young*, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) (noting that "separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted episode over a short period of time.").

With respect to time, Officer Lougheed was shocked by her Taser after she pulled the trigger on the device. After pulling the trigger, the Taser remained charged for five seconds and he took it from her and touched her arm with the device, shocking her. 1RP at 156. The log shows the device was triggered several times in an eleven second period when Officer Lougheed regained control of the device and shocked Mr. Steiner. 1RP at 190. The Taser is activated for five seconds and will automatically stop unless someone is still physically pulling the trigger. 1RP at 156. The officer testified "[i]t happened so quickly that that five second charge was still occurring from when I had pulled the trigger and he reached over towards me and touched me on the arm with it." 1RP at 156.

The incident occurred "as part of a continuous transaction or in a single, uninterrupted episode over a short period of time." See *State v. Tili*, 139 Wn.2d

107, 123-24, 985 P.2d 365 (1999) (separate forcible digital penetration of anus and vagina, followed by unsuccessful attempt to penetrate anus with penis, followed by vaginal penetration with penis, all of which occurred during a two-minute, continuous episode "were nearly simultaneous in time," and constituted same criminal conduct rather than three distinct rapes).

ii. Each offense had the same objective intent

As charged in this case, the State had to prove an assault and disarming Officer Loughheed. CP 1-3; RCW 9A.36.031(1)(g), RCW 9A.76.023(1). The assault and disarming the officer involved the same criminal intent. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this context, "intent" is not the *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime. *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990). Factors include whether one crime furthered the other, whether one remained in progress when the other occurs, and whether the offenses were part of the same scheme or plan. *State v. Calvert*, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996); *State v. Edwards*, 45 Wn. App. 378, 382, 725 P. 2d 442 (1986), overruled in part on other grounds, *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

In this case, Officer Lougheed testified that she decided to arrest Mr. Steiner for disorderly conduct and that he laughed and said "I couldn't arrest him if I tried." 1RP at 144. She stated that as she tried to turn him around to handcuff him, he yanked his arm away and hit her in the chest with his hand as a "warning push." 1RP at 145. She then unholstered her Taser and took his arm again and he pulled away again and she tased him.² 1RP at 154. The probes did not connect and she placed the Taser on his lower stomach to create a circuit, at which time he "grabbed the Taser and pulled it out my hands," and then touched her on the arm with it. 1RP at 156. This took place within the five second period the Taser continues to discharge after she pulled the trigger, so it is certain that the action of taking the Taser and shocking the officer took place within a five second period. After regaining the Taser, she shocked him again and he was taken into custody when other officers arrived. Officer Lougheed provided no other testimony regarding Mr. Steiner's action other than to say he told her that she could not arrest him. 1RP at 144. A witness - Christian Walters - testified that Officer Lougheed tried to grab Mr. Steiner's arm and he was "waving his arm back and forth trying to resist arrest, and just

²Officer Lougheed did not articulate why it was necessary to deploy her Taser to take a suspect into custody for mere suspicion of disorderly conduct where he was yelling in a vacant parking lot and where he allegedly resisted by "jerking his arm away" from her and giving her "sort of a warning push that I should get back" when she tried to handcuff him. 1RP at 145.

trying to escape any arresting involved like . . .” 1RP at 222.

Viewed objectively, Mr. Steiner’s criminal intent was the same from one offense to the other: a desire to prevent detention and arrest. Mr. Steiner disarmed the officer and assaulted her with it for the reason he told the officer—to prevent arrest. For this reason, the two offenses qualify as same criminal conduct. *Lessley*, 118 Wn.2d at 777. See also *State v. Anderson*, 72 Wn. App. 453, 464, 864 P.2d. 1001 (1994) (assault of an officer was committed in order to further his escape from the officer’s custody.)

No other objective criminal intent appears in this record.³ Given the ability of the officer to affect an arrest by using or threatening to use the Taser, Mr. Steiner’s act of disarming the officer to get the Taser and then touch her arm with the still-charged device shows no more than an intent to prevent arrest. Even Officer Lougheed said Mr. Steiner said his goal was to prevent her from placing him under arrest and that he said she “couldn’t arrest him if I tried.” 1RP at 144.

There was no discernible change in intent between the crimes of taking the Taser from the officer and shocking her with it. In addition, there was virtually no temporal break between taking the Taser and shocking the officer;

³Mr. Steiner consistently denied that he took the Taser from Officer Lougheed or that he shocked her with it. 2RP at 284.

it was not even necessary to pull the trigger since, as Officer Lougheed testified, it remained charged and active for five seconds after she initially activated the trigger. There is no evidence that Mr. Steiner paused or had time to form a new criminal intent to commit a second offense.

c. The court has discretion to find same criminal conduct under the anti-merger statute codified at RCW 9A.76.025

The offense of disarming a police officer is subject to an anti-merger statute. RCW 9A.76.025 provides:

A person who commits another crime during the commission of the crime of disarming a law enforcement or corrections officer may be punished for the other crime as well as for disarming a law enforcement officer and may be prosecuted separately for each crime.

Separate punishment is not mandatory under this provision; the trial court has discretion to apply the anti-merger statute if the offenses qualified as same criminal conduct.

This contention is supported by comparison to the analogous burglary anti-merger statute, which reads "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050. Under the burglary anti-merger statute, the trial court retains the discretion not to apply the anti-merger statute. *State v. Davis*, 90 Wn. App. 776,

783-84, 954 P.2d 325 (1998).

The burglary anti-merger statute contains virtually identical language to the anti-merger statute for disarming a police officer leads to the conclusion that the court had the discretion not to apply it. While Mr. Steiner was not entitled to have the court treat his disarming and escape offenses as the same criminal conduct, he was entitled to argue to the court to consider such a sentence. See *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) ("While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered."). In this case, had the court been asked by trial counsel to exercise its discretion in Mr. Steiner's favor, the offender score would have been "5" instead of "6" for the third degree assault charge, resulting in a standard range of 17 to 22 months rather than 22 to 29 months.

d. Defense counsel's failure to allege same criminal conduct was prejudicial

This Court should find Mr. Steiner's actions encompass the same criminal conduct. Despite the anti-merger statute, a sentencing court has the authority to treat disarming and other offenses as same criminal conduct for scoring purposes. Mr. Steiner's offenses satisfy the same criminal conduct test

and he had the right to have the trial court consider whether to exercise its discretion in his favor.

Trial counsel's deficient performance prejudiced Mr. Steiner because a same criminal conduct finding results in a lower offender score and because the anti-merger statute does not preclude treating the offenses as the same criminal conduct. Mr. Steiner's trial counsel was ineffective for failing to make the above argument. This Court should therefore vacate Mr. Steiner's sentence and remand for a new sentencing hearing.

2. THE TRIAL COURT ERRONEOUSLY INCLUDED A PRIOR CONVICTION FOR ATTEMPTED SECOND DEGREE ASSAULT IN COLORADO IN MR. STEINER'S OFFENDER SCORE THAT WAS NOT COMPARABLE TO A FELONY IN WASHINGTON

- a. The inclusion of out-of-state offenses in the SRA offender score violates due process unless the foreign conviction is legally and factually comparable to crimes in Washington.**

A sentencing court may not include a prior out-of-state conviction in a person's offender score unless the State proves the offense is comparable to a Washington felony. The trial court erred in including the prior Colorado conviction for attempted second degree assault in Mr. Steiner's offender score where the State did not prove that the offense was comparable to a felony in Washington.

A defendant's offender score establishes the range a sentencing court may use in determining the sentence. RCW 9.94A.530. Where the State alleges a defendant's criminal history contains out-of-state felony convictions, under the SRA, the State bears the burden of proving the existence and comparability of those convictions. RCW 9.94A.525; *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

To determine whether a foreign conviction is comparable to a Washington offense, the court engages in a two-step analysis. First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. *Ford*, 137 Wn.2d at 479 (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. *In re Personal Restraint of Lavery*, 154 Wn.2d 259, 255, 111 P.3d 837 (2005). But where the elements of the out-of-state crime are different or broader, the sentencing court must examine the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. *Morley*, 134 Wn.2d at 606; *Lavery*, 154 Wn.2d at 255. "If the elements of the foreign offense are broader than the Washington counterpart," that is, if the

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

b. Improper inclusion of out-of-state convictions may be challenged for the first time on appeal.

Miscalculation of the offender score involves a legal error; a defendant may challenge his or her offender score for the first time on appeal because such a sentence lacks statutory authority. *State v. Wilson*, 170 Wn.2d 682, 688–89, 244 P.3d 950 (2010). Illegal or erroneous sentences, including the improper inclusion of out-of-state convictions, may be challenged for the first time on appeal. *Ford*, 137 Wn.2d at 484–85. A sentencing court’s calculation of an offender score is reviewed de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.2d 816 (2007).

c. Mr. Steiner’s Colorado conviction for attempted second degree assault is not legally comparable to a Washington felony and should not have been included in his SRA offender score.

Mr. Steiner's 2015 Colorado conviction for burglary was not legally comparable to a Washington felony. A comparison of the assault statutes from Washington and Colorado shows that the Colorado statute criminalizes more conduct than the Washington second degree statute.

§ 18-3-203. Assault in the second degree

(1) A person commits the crime of assault in the second degree if:

...

(f.5)(I) While lawfully confined in a detention facility within this state, a person with intent to infect, injure, harm, harass, annoy, threaten, or alarm a person in a detention facility whom the actor knows or reasonably should know to be an employee of a detention facility, causes such employee to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material by any means, including but not limited to throwing, tossing, or expelling such fluid or material.

RCW 9A.36.021 provides as follows:

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
- (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
- (c) Assaults another with a deadly weapon; or
- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
- (e) With intent to commit a felony, assaults another; or

- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
 - (g) Assaults another by strangulation or suffocation.
- (2) (a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.
- (b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

Where a foreign conviction is not legally comparable to a Washington felony, the sentencing court may look at the record to assess whether the underlying conduct would have violated the comparable Washington statute. *Morley*, 134 Wn.2d at 606; *Lavery*, 154 Wn.2d at 255. In the Colorado offense, Mr. Steiner was charged with an attempted second degree assault of a police officer while being held in detention. CP 97. The prosecution alleged that the offense involved bodily fluid (saliva or mucus). The State alleged that Mr. Steiner engaged

in conduct constituting a substantial step toward the commission of assault in the second degree while lawfully confined in a detention facility, with intent to infect, injury, harm, harass, annoy, threaten, or alarm Officer Trainor of the Frisco Police Department, a person in a detention facility whom the defendant knew or reasonably should have known to be an employee of a detention facility, unlawfully and feloniously attempted to cause such person to come into contact with saliva and/or mucus by any means. . . .

CP 97.

Where the Colorado offense involved an attempt to spit on a detention

facility officer, the factual basis for the incident more closely resembles Washington's third degree assault or custodial assault statutes. RCW 9A.36.031 provides in relevant part:

Assault in the third degree.

- (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
 - (a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or
 - ...
 - (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or
 - ...
- (2) Assault in the third degree is a class C felony.

Washington's custodial assault statute, found at RCW 9A.36.100, provides in relevant part:

- (1) A person is guilty of custodial assault if that person is not guilty of an assault in the first or second degree and where the person:
 - ...
 - (b) Assaults a full or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any adult corrections institution or local adult detention facilities who was performing official duties at the time of the assault;
 - (c)(i) Assaults a full or part-time community correction officer

- while the officer is performing official duties; or
- (ii) Assaults any other full or part-time employee who is employed in a community corrections office while the employee is performing official duties; or

...

- (2) Custodial assault is a class C felony.

Under RCW 9A.28.020(1), “[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” Under the statute, an attempt to commit a crime is a gross misdemeanor when the crime attempted is a class C felony. RCW 9A.28.020.

The only potentially comparable Washington crimes to the 2015 Colorado conviction for attempted second degree assault involving bodily fluid in a jail are both class C felonies, which are categorized as gross misdemeanors when committed as an anticipatory offense. The Colorado conviction for attempted second degree assault therefore may not be included in the offender score. RCW 9.94A.525.

The State presented no evidence to show that the Colorado conviction was factually comparable to a Washington felony. Therefore, the court erred in including the Colorado conviction for “attempted second degree assault in jail” in Mr. Steiner’s offender score. *Morley*, 134 Wn.2d at 606; *Lavery*, 154 Wn.2d at 255.

d. To the extent defense counsel failed to preserve the challenge to calculation of his offender score, Mr. Steiner received ineffective assistance of counsel

Defense did not object to calculation of her client's offender score other than to tell the court that Mr. Steiner asserted that a conviction in Nevada was for third degree arson rather than second degree arson. RP (9/9/16) at 9, 13. Counsel did not object to inclusion of the Colorado conviction in Mr. Steiner's offender score.

In order to decide the first *Strickland* prong, the Court must conduct a comparability analysis of the prior conviction. *Thiefault*, 160 Wn.2d at 414. In making its factual comparison, the Court may rely only on facts in the foreign record that were admitted, stipulated to, or proved beyond a reasonable doubt. *Id.* at 415 (citing *Lavery*, 154 Wn.2d at 258; *State v. Farnsworth*, 133 Wn. App. 1, 22, 130 P.3d 389 (2006); *State v. Ortega*, 120 Wn. App. 165, 171-74, 84 P.3d 935 (2004)). If the foreign statute is broader than its Washington counterpart and the State did not prove the facts necessary to show factual comparability, counsel's failure to object constitutes ineffective assistance of counsel. *Thiefault*, 160 Wn.2d at 417. The defendant is necessarily prejudiced and the sentence must be reversed and remanded for resentencing. *Id.* at 417 & 417 n.4.

Here, as discussed above, the State did not prove the offense was

factually comparable to a Washington felony offense. Thus, defense counsel's failure to object amounts to ineffective assistance of counsel, which prejudiced Mr. Steiner.

e. In conjunction with the argument contained in Section 1, Mr. Steiner must be resentenced with an offender score of "4"

Where a sentence is erroneous due to the miscalculation of the offender score, the defendant is entitled to be resentenced. Here, Mr. Steiner's score should the offender score would have been "5" instead of "6" for the third degree assault charge, resulting in a standard range of 17 to 22 months rather than 22 to 29 months. *Ford*, 137 Wn.2d at 485. That is the appropriate remedy here. In conjunction with the argument that the offenses should be scored as same criminal conduct contained in section 1, supra, Mr. Steiner should be sentenced with an offender score of "4," resulting in a standard range of 12+ to 16 months.

3. MR. STEINER WAS NOT CAPABLE OF ASSISTING IN HIS DEFENSE AND THEREFORE WAS NOT COMPETENT TO STAND TRIAL

No incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues. *State v. Wicklund*, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). The conviction of an

accused while incompetent violates the due process right to a fair trial. *Pate v. Robinson*, 383 U.S. 375, 378, 385, S. Ct. 836, 15 L. Ed. 2d 815 (1966); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3; *Drope v. Missouri*, 420 U.S. 162, 172, 95 S. Ct. 896, 904, 43 L.Ed. 2d 103 (1975).

“[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense.” *Odle v. Woodford*, 238 F. 3d 1084, 1089 (9th Cir. 2001), cert. denied, 534 U.S. 888, 122 S. Ct. 201, 151 L. Ed. 2d 142 (2001). Competency requires the accused to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (citing *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)) (internal quotation marks omitted). "A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense." *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

Courts consider a variety factors in determining competence, including the defendant's appearance, demeanor, conduct, personal and family history,

past behavior, medical and psychiatric reports and the statements of counsel.
Fleming, 142 Wn.2d at 863.

Once the trial court makes an initial competency determination, the court should revisit the issue when new information is presented on the issue. *State v. Ortiz*, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). "[A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181. Here, the court found "the defendant has the capacity to understand the nature of the proceedings against him/her and to assist counsel in his/her defense." CP 30. The court also found "the presumption that the defendant is competent has not been overcome by the preponderance of the evidence." CP 30. (Based on these findings the court concluded "[t]he defendant is competent to proceed in this matter." CP 31 (Unnumbered finding of fact, Order Finding Defendant Competent, May 9, 2016). However, contrary to the trial court's initial findings, the evidence shows that Mr. Steiner was not competent to stand trial, a fact that became increasingly clear as the trial progressed.

a. The court erred in failing to order a second competency evaluation.

Because a reason to doubt competency became increasingly clear

during the trial, the court necessarily erred in failing to order a competency evaluation pursuant to RCW 10.77.060. "Whenever . . . there is reason to doubt [a defendant's] competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant." RCW 10.77.060(1)(a).

b. Standard of review

A determination of whether there is reason to doubt the defendant's competency is within the trial court's sound discretion. *State v. Lord*, 117 Wn.2d 829, 900, 822 P.2d 177 (1991). A court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claimed denial of a constitutional right is reviewed de novo. *Iniguez*, 167 Wn.2d at 280. The competency determination is a mixed question of law and fact, so the reviewing court must "independently apply the law to the facts." *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

c. The trial proceedings revealed Mr. Steiner's continuing lack of competency

As the trial proceeded, Mr. Steiner's mental difficulties became so

profound that that State addressed the issue during closing argument, stating that “some of you may have come to the conclusion that the defendant suffers from mental illness.” 2RP at 320. The State, rather than renewing a request for an evaluation under RCW 10.77.060(1)(a), instead tried to downplay the issue, arguing to the jury that Mr. Steiner’s competency was “not on the table right now.” 1RP at 320.

Mr. Steiner’s obsession with videos of the incident, which was evident as early as March 7, 2016, when he filed a pro se motion for preservation of videos he believed existed, became a centerpoint of the trial. His mental illness became further evident when he denied stating words clearly heard on the video and bizarrely claiming that Officer Lougheed was wearing a bombardier jacket, despite the improbability of wearing anything other than a uniform at the time of the incident. 2RP at 262. During cross-examination regarding the police video of the incident, Mr. Steiner denied that he said words that were heard on the video, and claimed that Officer Lougheed was wearing a bombardier jacket at the time of the incident, instead claiming that the video “has been tampered with,” that it had been “altered,” and that the video was not presented in complete form. 2RP at 277, 282-284. Mr. Steiner, during cross examination, stated: “[w]e don’t even have the whole video. Where is all the rest of the video?” 2RP at 283. And then, referring to video from other

sources that he believed existed, he asked “Where is the Harner video,” referring to a video that State’s witness David Harner testified he had taken of the incident using his cell phone, which he said was subsequently broken while in Utah and therefore unavailable. 1RP at 206. Mr. Steiner then asked “[w]here is the Dairy Queen video? Where is the video when they pulled into the motel? Where is all of the video?” 2RP at 283.

Mr. Steiner’s questionable competency was fully evident during allocution, when he read his pre-prepared statement which primarily consisted of religious references. After being stopped by the judge after reading several pages and being told that he had ten more seconds, Mr. Steiner continued:

Okay. Nobody cares—okay. And Pilate wrote the title of Jesus of Nazareth—Jesus of Nazareth, the King of the Jews. It was written in Hebrew, Greek, and Latin. The chief priest of the Jews did not like that and wanted Pilate to make this title say, but he said I am the king of the Jews. Pilate answered what I have written, I have written, the rest is still making history, and we are waiting patiently—

The Court: Okay. That’s all—

The Defendant: Jesus was homeless too—

RP (9/9/16) at 17.

As argued above, the record shows that as trial continued, sufficient basis existed to doubt Mr. Steiner’s competency. This was demonstrated by Mr. Steiner’s bizarre denial of facts clearly seen in the police video, which he asserted was tampered with or otherwise fabricated. 2RP at 283.

An ability to rationally assist is a basic requirement of competency. *Marshall*, 144 Wn.2d at 281. A defendant must be able to "communicate effectively with defense counsel." *Cooper v. Oklahoma*, 517 U.S. 348, 368, 116 S. Ct. 1373, 134 L.Ed.2d 498 (1996). A defendant must have "the present mental ability meaningfully to participate in his defense." *Johnson v. Estelle*, 704 F.2d 232, 237 (5th Cir. 1983), cert. denied, 465 U.S. 1009, 104 S. Ct. 1006, 79 L. Ed. 2d 237 (1984).

The court abused its discretion in failing to order another competency evaluation given the facts known to the court regarding Mr. Steiner's competency. A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense. *Marshall*, 144 Wn.2d at 281. Here, Mr. Steiner's actions and statements and apparent inability to appreciate and comprehend the nature of the evidence against him demonstrated an inability to appreciate his legal jeopardy. The court turned a blind eye to this spectacle, even as the degree of Mr. Steiner's inability to rationally comprehend the evidence become apparent during his testimony and sentencing. Accordingly, the court should have required a second evaluation once the degree of his mental illness became evident. Instead, the court did nothing.

The error was exasperated by the court's failure to hold a formal

evidentiary hearing at the time the court entered the initial agreed order of competency. See e.g. *Marshall*, 144 Wn.2d at 278. The failure to hold a hearing during which the court could determine Mr. Steiner's competency set the stage for the court's unwillingness to address competency once his mental illness became apparent during trial. The mere signing of an order upon presentation cannot substitute for a hearing on the matter. 1RP at 15-19. At the May 9, 2016, hearing there was no testimony taken and instead the court merely signed a pre-printed, fill-in-the-blank order form. Judge Brown failed to question Mr. Steiner and merely accepted the competency report's conclusion. Judge Brown had no opportunity to assess the credibility of any witnesses, including the doctor who opined the Mr. Steiner was competent. Later, Mr. Steiner's alarming, bizarre insistence on denying virtually irrefutable facts plainly visible in the video, his belief that other videos existed that were not provided to him, and his belief that the police video was fabricated or altered, was sufficient to prompt a reasonable person to have a legitimate doubt as to Mr. Steiner's competency. As noted above, the appellant's behavior was sufficiently alarming that the prosecution referred to the issue during closing, asserting that although it may be a reasonable to conclude that Mr. Steiner "suffers from mental illness," it was not an issue before the jury. 2RP at 320.

d. The remedy is reversal of the convictions.

The abdication of the mandatory evaluation procedures under RCW 10.77.060 where there is reason to doubt competency requires reversal. *Marshall*, 144 Wn.2d at 280. Moreover, Washington case law demonstrates competence embodies, at a minimum, rationality. Because Mr. Steiner was not rational, he was not competent and should not have been tried for assault and disarming the officer. *Marshall*, 144 Wn.2d at 281; *Woodford*, 238 F. 3d at 1089. Reversal rather than remand for a retroactive competency hearing is required, given the inherent difficulties of such a *nunc pro tunc* determination even under the most favorable circumstances. *Pate*, 383 U.S. at 387; *Drope v. Missouri*, 420 U.S. 162, 183, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

4. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Steiner does not substantially prevail on appeal; he asks that no appellate costs be authorized under title 14 RAP. See RAP 14.2. The record does not show that he had any assets, and the court did not find that he had the ability to pay and waived all but legal financial obligations. RP (9/9/16) at 18. Mr. Steiner was transient at time of arrest and his homelessness was a theme that revisited several times during trial and sentencing. The court imposed legal financial obligations including \$500.00 victim assessment, \$200.00 court costs, and \$100.00 felony DNA collection fee. RP (9/9/16) at

18; CP 110-11.

The trial court found him indigent for purposes of this appeal. CP 119-120. There has been no order finding Mr. Steiner's financial condition has improved or is likely to improve since that finding.

Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court has discretion to deny the State's request for appellate costs in the event this appeal is unsuccessful. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in "compelling circumstances." *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, Division One concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Steiner’s continuing indigence, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

E. CONCLUSION

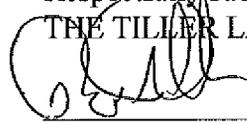
For the reasons discussed above, this Court should reverse Mr. Steiner’s convictions.

In the alternative, this Court should find the acts underlying the convictions for disarming a police officer and assault constituted the same conduct, and find that the Colorado conviction for attempted second degree assault should not be included in the calculation of Mr. Steiner’s offender score and remand for resentencing.

This Court also should exercise its discretion and deny any request for appellate costs, should Mr. Steiner not prevail in his appeal.

DATED: March 14, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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Of Attorneys for Edward Steiner

CERTIFICATE OF SERVICE

The undersigned certifies that on March 14, 2017, that this Appellant's Opening Brief was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Prosecuting attorney, Ms. Katherine Svoboda and copies were sent by first class mail, postage prepaid to the following:

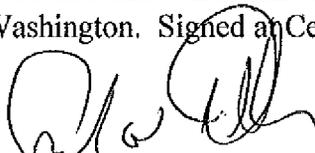
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LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 14, 2017.



PETER B. TILLER

Appendix A

RCW 9A.36.031

Assault in the third degree.

- (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
- (a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or
 - (b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or
 - (c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or
 - (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or
 - (e) Assaults a firefighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or
 - (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or
 - (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or
 - (h) Assaults a peace officer with a projectile stun gun; or

- (i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW; or
- (j) Assaults a judicial officer, court-related employee, county clerk, or county clerk's employee, while that person is performing his or her official duties at the time of the assault or as a result of that person's employment within the judicial system. For purposes of this subsection, "court-related employee" includes bailiffs, court reporters, judicial assistants, court managers, court managers' employees, and any other employee, regardless of title, who is engaged in equivalent functions; or
- (k) Assaults a person located in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This section shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the assault.
- (2) Assault in the third degree is a class C felony.

RCW 9A.76.023

Disarming a law enforcement or corrections officer.

- (1) A person is guilty of disarming a law enforcement officer if with intent to interfere with the performance of the officer's duties the person knowingly removes a firearm or weapon from the person of a law enforcement officer or corrections officer or deprives a law enforcement officer or corrections officer of the use of a firearm or weapon, when the officer is acting within the scope of the officer's duties, does not consent to the removal, and the person has reasonable cause to know or knows that the individual is a law enforcement or corrections officer.
- (2)(a) Except as provided in (b) of this subsection, disarming a law enforcement or corrections officer is a class C felony.
- (b) Disarming a law enforcement or corrections officer is a class B felony if the firearm involved is discharged when the person removes the firearm.

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