

NO. 49443-4

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

STATE OF WASHINGTON,
Respondent,

v.

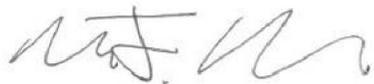
EDWARD JAMES STEINER,
Appellant.

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

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: 

JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

OFFICE AND POST OFFICE ADDRESS
Grays Harbor County Prosecuting Attorney
102 W. Broadway, Room 102
Montesano, WA 98563
(360) 249-3951

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **An anti-merger statute allows the court to punish Assault in the Third Degree and Disarming a Law Enforcement Officer seperately, so the Defendant did not receive ineffective assistance of counsel at sentencing.**
2. **The Defendant's Colorado conviction is factually comparable to Custodial Assault, a class C felony, so the court did not err in counting it towards the offender score.**
3. **The trial court did not err in finding the Defendant competent to stand trial because a defendant is presumed competent, and all parties agreed that the Defendant was competent.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Factual Background

On February 4, 2016, Officer Kristi Lougheed of the Aberdeen Police Department was on duty, working patrol. Verbatim Report of Proceedings 128. In the morning hours Officer Lougheed initially contacted the Defendant outside a local motel in the city of Aberdeen in response to a complaint from the hotel management. VRP at 129. Officer Lougheed contacted the Defendant, the matter appeared to be resolved, and the Defendant was allowed to leave in a taxi. VRP at 129-30.

Sometime later that morning Officer Lougheed was dispatched to the Dairy Queen located on Simpson Avenue located in the city of Aberdeen. VRP at 131. The Defendant was in the back of a taxi and

refusing to get out. *Id.* After a brief discussion, the taxi driver dropped the Defendant off at SeaMar nearby where the Defendant said he had an appointment. VRP at 131-32.

Officer Lougheed accompanied the Defendant to the SeaMar office and spoke to the receptionist on his behalf. VRP at 133. Officer Lougheed was told that the Defendant had no appointment that day. VRP at 132-133. Officer Lougheed offered to take the Defendant and his belongings to a local motel, if he so desired. VRP at 134. They drove to several local motels in the city of Aberdeen, none of which the Defendant approved of. VRP at 135-36. Eventually she drove him back to the bus stop near SeaMar. VRP at 137-38.

During this time the Defendant was becoming agitated. VRP at 138-39. At one point he told Officer Lougheed, "I am a cop killer." VRP at 139. At this point Officer Lougheed insisted the Defendant to get out of the car and took his belongings out of the trunk and gave them to him. VRP at 140. She pulled a short distance away, making a determination that she was going to try to confirm an outstanding warrant that the Defendant had for his arrest so he could be taken into custody. VRP at 140. During this time the Defendant was yelling at two other young men

nearby who were working on their car. VRP at 141. Officer Lougheed's direction that he "cool down" went ignored. VRP 142.

The Defendant continued to become agitated and was yelling. VRP at 143. Officer Lougheed told the Defendant that she was going to place him under arrest. VRP at 144. The Defendant stated that she couldn't arrest him even if she tried. *Id.* As Officer Lougheed was trying to place handcuffs on the Defendant, he turned and hit her in the chest. VRP 144-146.

The Defendant resisted attempts to be placed under arrest. At one point Officer Lougheed drew her Taser, an electrical stun-gun. VRP at 146. When the Defendant continued to resist Officer Lougheed deployed her Taser. VRP at 154. It did not appear to have much effect on the Defendant. VRP 154-155. During the struggle the Defendant pulled the Taser from her hands as the Taser was still discharging. VRP at 156. The shock from the Taser struck Officer Lougheed. VRP at 156-57. During the ensuing struggle Officer Lougheed managed to grab the Taser away from the Defendant, placed it on his thigh, and took him to the ground. VRP at 157. Officer Lougheed Tazed him a second time and was finally able to restrain him. VRP at 158. A second officer arrived and assisted placing handcuffs on the Defendant. *Id.*

Procedural History

The Defendant was charged by Information on February 5, 2016, with Assault in the Third Degree, RCW 9A.36.031(1)(g) and (h) and with Disarming a Law Enforcement Officer, RCW 9A.76.023(1). Clerk's Papers at 1-2.

On April 25, 2016, an order was entered for a competency evaluation pursuant to RCW 10.77.060. CP at 19-25. An evaluation was performed at the Grays Harbor County Jail by Christopher Cadle, Ph.D., and reviewed by the court and counsel. CP at 30-31. The evaluation indicated that the Defendant was competent. VRP at 15. An agreed order was entered, pursuant to the opinion of Dr. Cadle, finding the Defendant competent to stand trial. VRP 15-16, 59. Then, court appointed counsel Christopher Baum, citing letters written by the Defendant and the Defendant's dissatisfaction with his representation, asked to be allowed to withdraw. CP at 41, VRP 15-20.

Karrie Young was appointed on May 12, 2016 to represent the Defendant. CP at 44. She obtained funds for a private investigator. CP at 49. The court subsequently a good cause continuance due to the unavailability of the victim in this matter, Officer Kristi Lougheed. CP at 39-40.

The matter went to trial on August 9 – 10, 2016. The jury returned a verdict of guilty pursuant to the charge of Assault in the Third Degree under RCW 9A.36.031(g), but declined to make a finding that the Defendant had assaulted Kristi Loughed with a projectile stun gun pursuant to RCW 9A.36.031(h). CP at 89-90. The Defendant was also found guilty Disarming a Law Enforcement Officer, RCW 9A.76.023(1). CP at 91.

Sentencing was held on September 9, 2016. The court and counsel were provided with a list of the Defendant's criminal history and certified copies of relevant documents, including the judgment and sentence for Attempted Assault in the Second Degree in Summit County, Colorado cause number 2015CR000128. Exhibit 1 (Sept. 9, 2016.) The Defendant was found to have an offender score of 6 on each count. His standard range was 22 to 29 months on the charge of Assault in the Third Degree and a standard range of 0 to 12 months on the charge of Disarming a Law Enforcement Officer. CP at 107. He was sentenced to the top of the standard range.

ARGUMENT

1. **An anti-merger statute prevents Assault in the Third Degree and Disarming a Law Enforcement Officer from counting as the same criminal conduct, so the Defendant did not receive ineffective assistance at sentencing.**

The Defendant first claims that his trial counsel was ineffective for failing to argue that the two crimes that he was convicted of must count as the same criminal conduct for the purposes of offender score calculation. However, this argument ignores the anti-merger statute.

Standard of review for Ineffective Assistance of Counsel.

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). Ineffective assistance of counsel is a fact-based determination...” *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing *State v. Rhoads*, 35 Wash.App. 339, 342, 666 P.2d 400 (1983).) Appellate courts “review the entire record in determining whether a defendant received effective representation at trial.” *Id.*

Strickland explains that the defendant must first show that his counsel’s performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must

have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689. “Reviewing courts must be highly deferential to counsel’s performance and ‘should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” *Carson* at 216 (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant bears the “heavy burden” of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met than a defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

The trial court properly exercised its discretion to sentence the Defendant pursuant to the anti-merger statute, RCW 9A.76.025.

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.

Although there appears to be no case interpreting this statute, the language is substantively identical to RCW 9A.52.050, the burglary anti-merger statute. *See* RCW 9A.52.050. The Washington Supreme Court has specifically held that, “[T]he plain language of RCW 9A.52.050 expresses the intent of the legislature that “any other crime” connected in the commission of a burglary would not merge with the offense . . . when the defendant is convicted of both.” *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). Likewise, even if the burglary in the other crime involves the same criminal conduct, the trial court has discretion to punish the burglary separately from the other crime. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). Because the language of RCW 9A.76.025 is substantively identical to the burglary anti-merger statute, the same analysis should apply. The Defendant concedes as much in his brief. *See*

Brief of Appellant at 22. The Court in this matter clearly decided to punish the Defendant separately for the two crimes, as the record shows.

The Court acknowledged that it had read all of the sentencing materials and had taken into account the Defendant's extensive criminal history. Therefore, the Court had the extensive criminal history as set forth by the State in its Statement of Prosecuting Attorney. CP at 79. This includes numerous crimes and violent crimes that could not be included within the Defendant's offender score. The Court expressed its belief that the Defendant was a "dangerous" person. The trial court's comments at sentencing demonstrate that the court decided that the Defendant should be subjected to the maximum possible punishment.

All right. I have reviewed all of the documents that have been presented to me. I presided over the trial. I heard the evidence. The jury found you guilty, Mr. Steiner. I believe that you are guilty. I believe that you are dangerous. There is no question in my mind that you committed the acts for which the jury has found you guilty. I agree with Mr. Walker. I think you pose a serious risk to any law enforcement officer who has the misfortune of coming into contact with you. You have 38 convictions that have been verified, many of them involve violent conduct, many of them involve assaultive behavior towards law enforcement officers.

The standard range for these crimes has been set forth in the statement of prosecuting attorney. It's 22 to 29 months on the assault in the third degree. It is 0 to 12 months on the unranked felony of disarming a police officer. I believe that the appropriate sentence in this case is top of the range on both counts. I am going to order that you serve 29 months on the third degree assault, 12 months on the disarming of a police officer.

You will have 12 months of community custody.

VRP 9/9/16 at 17-18:

Had defense counsel asked the court to ignore the anti-merger statute, the standard range on the charge of Assault in the Third Degree would have been 17-22 months. It is apparent in light of the court's remarks, that the court had no intention of giving the Defendant such a lesser sentence. The Defendant suffered no prejudice. This assignment of error should be denied.

- 2. The Defendant's Colorado conviction for Attempted Assault in the Second Degree is comparable to the Washington felony of Custodial Assault, so the court did not err in including it in the offender score.**

The Defendant pled guilty to Counts 2 and 7 in Summit County, Colorado District Court, case number 2015CR000128. *See Exhibit 1*

(9/9/2016) at 1.¹ Count 2, Attempted Assault in the Second Degree, is both legally and factually comparable to the Washington felony of Custodial Assault and was correctly included in the offender score calculation.

Standard of review.

“Questions regarding the comparability of offenses present issues of law that we review *de novo*.” *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181, 183 (2014) (citing *State v. Stockwell*, 159 Wash.2d 394, 397, 150 P.3d 82 (2007).) “Comparability is both a legal and a factual question.” *State v. Collins*, 144 Wn. App. 547, 553, 182 P.3d 1016, 1019 (2008) (citing *State v. Morley*, 134 Wash.2d 588, 606, 952 P.2d 167 (1998).)

Washington law employs a two-part test to determine the comparability of a foreign offense. A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct

¹ The exhibit consists of four pages. Page 1 appears to be entitled “Sentence Order,” while the remaining pages are the “Amended Complaint and Information.”

underlying the foreign offense would have violated the comparable Washington statute.

State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580, 583 (2007) (citing *Morley*.) The purpose of the comparability of the analysis is to ensure that defendants with equivalent prior convictions are treated the same way regardless whether those prior convictions were incurred in Washington or elsewhere. *State v. DeVincentis*, 112 Wn.App. 152, 163-64, 47 P.3d 606 (2002).

The State bears the burden of proving the comparability of any out-of-state conviction. *State v. Ford*, 137 Wn.2d 472, 479-80 (1999).

The Colorado statutes are comparable to Washington criminal laws.

The Colorado statute the Defendant was convicted of reads,

A person commits the crime of assault in the second degree if... [w]hile 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.

Colorado Revised Statutes 18-3-203(f.5)(I). The Colorado attempt statute is nearly identical to that of the attempt statute in Washington:

A person commits criminal attempt, if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step towards commission of the offense. A substantial step is any conduct whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

CRS 18-2 101.

The equivalent Washington statute, RCW 9A.36.100(1)(b), provides, “[a] person is guilty of custodial assault... where the person... [a]ssaults 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....”

In Washington, “[t]hree definitions of assault are recognized... (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.”

State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439, 442 (2009).

Alternatives (2) and (3) require specific intent. *State v. Hall*, 104 Wn.App. 56, 62, 14 P.3d 884, 887 (2000). “When an attempt to commit a specified act is included within a crime definition, then the attempt constitutes the crime rather than the general crime of attempt... *Hall* at 65 (citing *State v. Austin*, 105 Wash.2d 511, 514–15, 716 P.2d 875 (1986).)

A second-degree assault in Colorado requires that a defendant act with specific intent, as does the equivalent Washington crime. There is no substantive difference in the Colorado provision requiring the victim to be an employee of the detention facility and the equivalent Washington provision.² The only difference is that the Colorado statute requires a completed battery, or it must be charged as an attempted second-degree assault. In Washington, however, an attempted battery is a completed assault. Therefore, an attempted second-degree assault in Colorado under CRS 18-3-203(f.5)(I) is a completed Custodial Assault in Washington. The statutes are comparable and it was not error for the court to include the conviction in the offender score.

² The Colorado statute appears to be narrower in this respect because it requires that the Defendant know the victim is an employee of the detention facility, and it does not protect vendors or “agents” who are not employees.

The Defendant's Colorado conviction is factually comparable to Custodial Assault because the Defendant was charged with trying to spit on a corrections officer, a felony in Washington.

Because the State presented the charging document alleging facts, the court could also perform a factual analysis. The allegation would clearly constitute a violation of RCW 9A.36.100(1).

In Colorado, the Defendant was charged in Count 2 as follows:

On or about June 5, 2015, by engaging in conduct constituting a substantial step toward the commission of assault in the second degree, Edward James Steiner, while lawfully confined in a detention facility, with intent to infect, injure, 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, in violation of sections 18-3-203(1)(f.5) and 18-2-101, C.R.S.

Exhibit 1 (9/9/2015) (spacing errors in original.)

By its terms, the information requires the State to prove beyond a reasonable doubt that the Defendant attempted to commit a battery, an intentional act, by use of saliva or mucus. The alleged conduct amounts to attempting to spit on a corrections officer. Under the definition of assault

in Washington, such a battery would constitute an assault, as would an attempt to commit such a battery. *See* WPIC 35.50.

It is clear from the Colorado charging document that the Defendant's conduct, as alleged, would constitute a violation of custodial assault statute, RCW 9A.36.100. The Colorado conviction was comparable to Washington law and properly counted towards the offender score by the court at sentencing.

3. All parties agreed that the Defendant's presumption of competency had not been overcome, so the court did not abuse its discretion.

The Defendant is probably mentally ill, to some degree. However, that does mean he is incompetent. All parties agreed that he was competent after he was professionally evaluated. Therefore, it was not error to find that the presumption of competency had not been overcome.

Standard of Review.

Appellate courts "...defer to the trial court's judgment of a defendant's mental competency." *State v. Coley*, 180 Wn.2d 543, 551, 326 P.3d 702, 706 (2014) (citing *State v. Ortiz*, 104 Wash.2d 479, 482, 706 P.2d 1069 (1985).) A decision finding a defendant competent will be reversed "only upon finding an abuse of discretion." *Id.*

The burden of proof is upon the defendant to show by a preponderance of the evidence that he is not competent. *Id.* at 556. A defendant is competent to stand trial if he is “capable of properly understanding the nature of the proceedings against him and if he is capable of rationally assisting his legal counsel in the defense of the cause.” *State v. Swanson*, 28 Wn.App. 759, 760, 626 P.2d 527 (1981). The existence of a mental disorder, in and of itself, does not establish incompetency. *State v. Smith*, 74 Wn.App. 844, 850, 875 P.2d 1249 (1994).

The presumption of competency was not overcome.

The parties agreed that the Defendant was competent to stand trial. CP at 30. The court considered the competency evaluation performed by Dr. Christopher D. Cadle, Ph.D of Western State Hospital. *Id.* The court decided, based on the stipulation of the parties and the evaluation, that the presumption of competency had not been overcome, and found the Defendant competent.

While the Defendant may have had mental health issues, they did not interfere with his ability to assist counsel. In particular, the court will note that the Defendant filed numerous letters with the court, as well as a motion for the production of the officer’s “dash cam” footage. There is

nothing in the record to indicate that the Defendant did not have the ability to relate past events that would be useful to assist his attorney. Indeed, it is apparent from the testimony from the Defendant that he was able to relate the events as he recalled them. A defendant is not incompetent to stand trial simply because his versions of events are different than those of the arresting officer.

The trial court reasonably exercised its discretion. This court should defer to the trial court's competency determination, based upon the report from Western State Hospital and based upon the trial court's observations of the Defendant's behavior and demeanor. *Krenshaw* at 330. This assignment of error should be denied.

CONCLUSION

The Defendant was correctly sentenced. The anti-merger statute prevented the two charges from merging, and the Colorado conviction is clearly comparable to a Washington felony. No error occurred in sentencing.

And the court did not err in finding the Defendant competent. A defendant is presumed competent, and all parties agreed that he was competent. There was no manifest abuse of discretion.

The Defendant was fairly tried, convicted and sentenced, and this court should deny the assignments of error and affirm the court below.

DATED this _____ day of June, 2017.

Respectfully Submitted,

BY: 

JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

JFW / jfw

GRAYS HARBOR PROSECUTING ATTORNEY

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