

FILED  
Court of Appeals  
Division II  
State of Washington  
5/4/2018 10:42 AM

NO. 50631-9-II

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

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STATE OF WASHINGTON, Respondent

v.

RUBEN SOLOVIOV, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00672-8

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878  
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

- I. The trial court properly excluded evidence of the victim's potential general drug use**
- II. Soloviov's prior Oregon offenses are comparable to Washington offenses**
- III. Soloviov received effective assistance of counsel**

### **STATEMENT OF THE CASE**

Ruben Soloviov (hereafter 'Soloviov') was charged by information with Burglary in the First Degree, Robbery in the First Degree, and Assault in the Second Degree. CP 1-2. These charges were based on an incident during which Soloviov forcibly entered Steven Garrison's apartment without permission and assaulted him, causing substantial bodily harm, used various objects to aid in the assault, and allegedly took a little over \$200 in U.S. currency from Mr. Garrison's person. CP 1-2; RP 335-43. The matter proceeded to jury trial in March 2017. RP 50-766.

At trial, Steven Garrison testified that in January 2016 he lived at 2600 T Street, Apartment 50 in Vancouver, State of Washington. RP 318. Mr. Garrison had been in a car accident in August 2013 that left him with a traumatic brain injury that had lasting effects on his ability to function. RP 385, 511-12. After the accident Mr. Garrison's cognitive functions were lessened. RP 512 Mr. Garrison initially moved into the apartment on

T Street in July 2015 and had lived alone. RP 319-21. His sister, Kimberly Faley, usually visited him about three times a week to see how he was doing and help him if needed. RP 514-15. His ex-wife, Theresa Garrison also visited him multiple times a week to help him. RP 578. Sometime in September 2015, a woman named Luda moved in with Mr. Garrison. RP 322. Luda lived with Mr. Garrison for about a month and moved out in October 2015. RP 323. Luda visited Mr. Garrison in January 2016 at his apartment and asked him if he wanted to buy some watches. RP 325. Soon after Luda showed up at Mr. Garrison's apartment, Soloviov also came by. RP 326-27. Mr. Garrison had met Soloviov once previously through Luda, but Soloviov had never been to his apartment before. RP 327. Luda and Soloviov stayed at Mr. Garrison's apartment the rest of the day and spent the night. RP 328.

The next day, on January 12, 2016, Mr. Garrison and Luda were cooking in the kitchen when Soloviov woke up. RP 328. Soloviov suddenly came up to Mr. Garrison and hit him in the face with a closed fist, accusing him of having stolen the key to his truck. RP 329. Mr. Garrison had not taken Soloviov's key and would not have as Mr. Garrison does not drive. RP 329. After hitting Mr. Garrison, Soloviov went and sat down and Mr. Garrison and Luda finished cooking. RP 330. All three ate, but Soloviov became more agitated about his key. RP 330.

Eventually, Mr. Garrison's sister, Ms. Faley, arrived at his apartment and she took Luda away and also made Soloviov leave. RP 331, 334-35, 517-20. But when Mr. Garrison was walking outside shortly after, Soloviov chased him and caught up with him and told him he had left his jacket in Mr. Garrison's apartment. RP 331. Mr. Garrison did not think he had, but he reluctantly agreed to go back to his apartment to look for his jacket. RP 331. Mr. Garrison told Soloviov to wait outside and he went into his apartment to look for the jacket. RP 335. Mr. Garrison went inside and closed the door behind him. RP 335. He looked around his apartment, but could not find a jacket, so he went to leave. RP 335. As Mr. Garrison opened his front door to leave, Soloviov started hitting him in the face and forced his way inside. RP 336. Soloviov was punching Mr. Garrison in the face; he then pushed him inside the apartment and slammed the door closed. RP 336. Soloviov continued hitting Mr. Garrison inside the apartment. RP 336. Mr. Garrison grabbed a nearby lamp and banged it on the window, trying to get attention of anyone who might be outside. RP 336. Soloviov grabbed the lamp from Mr. Garrison and hit him with it. RP 336. Mr. Garrison then grabbed a long stick that he kept in the window track to prevent it from being opened; Mr. Garrison used the stick to hit the window, again hoping to either break the window and escape or alert someone outside to what was happening. RP 337. Soloviov then grabbed

the stick from Mr. Garrison and hit Mr. Garrison with the stick. RP 337. Soloviov hit Mr. Garrison in the arms, head, sides and legs with the stick. RP 338. Soloviov was upset and violent during this attack. RP 338.

During this assault, Mr. Garrison did not hit Soloviov, but only raised his arms to cover his face and head. RP 337-39. Mr. Garrison also tried to break the window open with a commemorative Jack Daniels bottle, but Soloviov also took that away from him and hit him with it in the head. RP 339. Throughout the attack, Soloviov struck and kicked Mr. Garrison about his head, chest, arms, legs, and back. RP 340-41. When Soloviov finally stopped, he grabbed Mr. Garrison's wallet from Mr. Garrison's back pants pocket and said, "Steve Garrison, 2600 T Street," and he took the money out of Mr. Garrison's wallet, took Mr. Garrison's cell phone, and then told Mr. Garrison that he would kill him if he called the police. RP 341. Mr. Garrison believed that Soloviov would kill him and thought throughout the attack that he was going to kill him. RP 341. Soloviov took a little over \$200 from Mr. Garrison. RP 342. Soloviov then left. RP 343.

Mr. Garrison suffered several injuries from this attack: his ears were bleeding, he was bleeding from his head and arm, and he had a fracture in his hand, and his entire body was in pain. RP 345. As his cell phone had been taken by Soloviov, Mr. Garrison had no way of calling for

help from his apartment. RP 345. He walked to the bar around the corner and tried to clean up some of the blood in the bathroom. RP 345. He then used the bar telephone to call his ex-wife for help, but she said no, so he went to another restaurant, then the minute mart, and got some bandages and chicken. RP 345, RP 580-81. While he was at another bar, his ex-wife, Theresa Garrison, showed up. RP 346. Ms. Garrison had been at work when Mr. Garrison had called her around 3:30-4pm; she got off work at 5pm and came to meet him then. RP 581. Ms. Garrison wanted him to call police and go to the hospital, but Mr. Garrison was afraid of the threats Soloviov had made and did not want to do either thing. RP 346-47, 582. So Ms. Garrison left and Mr. Garrison went to the McDonald's nearby. RP 347. Soloviov was there at the back of the restaurant. RP 347. Soloviov started to approach Mr. Garrison, but then hesitated. RP 347. Mr. Garrison stayed at the McDonald's because he felt safer there as he was around people and did not believe Soloviov would do anything around other people. RP 347.

At some point in time soon after the attack, Mr. Garrison called his sister, Ms. Faley, and told her to get away from Luda because Soloviov had assaulted him. RP 348-49, 522-23. Ms. Faley did not recognize the number that Mr. Garrison called her from; it was not his cell phone number. RP 544. While at the McDonald's, someone Mr. Garrison knew

showed up and that person agreed to help him get somewhere safe. RP 348. Then, several hours later, Mr. Garrison went back to his apartment and locked everything up and left again. RP 348. Then, several hours after that, Mr. Garrison returned to his apartment and cleaned the mess up in his apartment. RP 350. The next day, Mr. Garrison's son, Roman, convinced him to go to the hospital. RP 351. Roman dropped him off at the hospital, and then his ex-wife came and met him there. RP 352. The staff at the hospital convinced Mr. Garrison to report the attack to the police. RP 353. Officer Adam Millard of the Vancouver Police Department came and met with Mr. Garrison at the hospital and took a statement from him. RP 354. Mr. Garrison told Officer Millard what had happened and who the people were who were involved. RP 357-58. Mr. Garrison let Officer Millard take photographs of his injuries, which showed the injuries to his broken hand, cuts to his head and forearms, injuries to his legs, ears, and face. RP 357-66.

Zachary Berkeley testified at trial; in January 2016 he worked at a McDonald's in Vancouver, Washington. RP 473. Mr. Berkeley was working there on January 12, 2016 when Mr. Garrison and Soloviov were at the restaurant. RP 474. Mr. Berkeley had seen Mr. Garrison many times at McDonald's and testified that he was usually very smiley and talkative. RP 474, 477-78. However on January 12, 2016, Mr. Garrison appeared to

have something wrong with him; he had blood on his ear, appeared to be hurt and was holding his arm. RP 474-75. Mr. Garrison also appeared incoherent and wasn't responding well when Mr. Berkeley spoke to him. RP 475. Mr. Garrison was unable to speak so he wrote a note to Mr. Berkeley saying he needed to use a phone. RP 475. Mr. Berkeley would get in trouble at work if he let a customer use his phone, so he told Mr. Garrison that he couldn't use his phone. RP 475. Mr. Garrison then asked for a drink and then went to other customers in the restaurant asking to use their phones. RP 475.

Mr. Berkeley then noticed Soloviov come in, cut in line, and order some food from him; he then seemed to follow Mr. Garrison around the restaurant, trying to make eye contact with Mr. Garrison, but Mr. Garrison refused to interact with him. RP 476-77. Eventually, Mr. Garrison left through the back door of the restaurant; Soloviov followed him. RP 483.

The next day, on January 13, 2016, Mr. Garrison's son, Roman, took Mr. Garrison to the hospital at his mother's direction. RP 587. Ms. Garrison then met Mr. Garrison at the hospital. RP 587-88. Dr. Dina Brothers treated Mr. Garrison for his injuries at PeaceHealth Southwest Medical Center in the Emergency Department on January 13, 2016. RP 452, 454-55. Mr. Garrison complained of arm pain after an assault. RP 456. Dr. Brothers ordered x-rays and found that Mr. Garrison had a

fracture to the fourth metacarpal on his left hand. RP 456-57, 459. Dr. Brothers also noted that Mr. Garrison had multiple bruises, a laceration behind his left ear, an abrasion on both ears, a large abrasion on the left forearm, bruising with edema to his left upper arm and on his left hand. RP 457-58.

Ms. Garrison urged Mr. Garrison to report the incident to the police, but Mr. Garrison was hesitant because he was afraid of retaliation. RP 591. However, Officer Adam Millard of the Vancouver Police Department was dispatched to the hospital on January 13, 2016 at about 4pm. RP 109-10. Officer Millard made contact with Mr. Garrison and Ms. Garrison. RP 111. Officer Millard saw that Mr. Garrison was injured; Mr. Garrison told him there had been a forced entry into his apartment and that he had been assaulted. RP 113. Mr. Garrison identified his attacker as a man named Ruben who was associated with a woman named Luda. RP 116. Officer Millard took a number of photographs of Mr. Garrison's injuries, which were admitted into evidence at trial. RP 137-47. Officer Millard asked a sergeant in his department to do a records search for a man named Ruben who was associated with a person named Luda. RP 123. He came up with Soloviov and obtained a photograph of him. RP 123.

During his investigation Officer Millard went to the McDonald's that Mr. Garrison went to the night he was attacked and obtained video footage of the time Mr. Garrison was in the restaurant. RP 120-21. He also spoke with Mr. Berkeley. RP 121. Mr. Garrison and Ms. Garrison came to the police station where Mr. Garrison was able to identify Soloviov as the man who attacked him via the video surveillance that Officer Millard had obtained from McDonald's security cameras. RP 123. Several days after the incident Officer Millard was able to obtain a photo laydown that included Soloviov's photo in it. RP 128. The laydown consisted of six photos of people who looked similar to each other. RP 129. He showed that to Mr. Garrison and asked him if he recognized anyone in the laydown. RP 128-32. Mr. Garrison identified Soloviov as the person who he knew as Ruben and who had attacked him. RP 131-32. Mr. Garrison indicated that he was positive that was the person. RP 132. Officer Millard also visited Mr. Garrison's apartment and took photographs of the items that Mr. Garrison indicated had been used in the attack to include the wooden stick, the lamp, and the Jack Daniels bottle. RP 148-51.

A few days after the attack, Ms. Faley visited Mr. Garrison and saw that he was injured: he had bruises and a broken arm that was in a

splint, and was walking differently. RP 546. Mr. Garrison appeared to be in pain. RP 547.

At the close of testimony and after the parties' closing arguments and deliberations, the jury returned verdicts of guilty on Burglary in the First Degree and Assault in the Second Degree, and not guilty on the Robbery in the First Degree. CP 152-54. At sentencing, the State introduced evidence, including certified records from the State of Oregon, which showed Soloviov had prior convictions in the State of Oregon for Assault in the Second Degree and Unlawful Use of a Motor Vehicle. RP 775-81; CP 170-273. The trial court ruled that Soloviov's prior conviction for Assault in the Second Degree in Oregon was comparable to a Washington Assault in the Second Degree and that his prior Unlawful Use of a Motor Vehicle from Oregon was comparable to a Washington Theft of a vehicle or possession of stolen property/motor vehicle. RP 804. The trial court then sentenced Soloviov to the high end of the standard range. CP 276-88. Soloviov timely appeals. CP 290.

## ARGUMENT

### **I. The trial court properly excluded evidence of the victim's potential general drug use**

Soloviov contends that the trial court should have allowed him to introduce evidence of scales that may have been used to weigh

methamphetamine found in the victim's house five days after the incident occurred. Soloviov also alleges the trial court erred in failing to allow him to introduce evidence the victim had been terminated from a job in the past due to methamphetamine use. As Soloviov did not attempt to introduce any evidence which tended to show the victim had used drugs at or just before the time of the incident, but instead attempted to admit general character evidence of the victim, the trial court properly excluded the evidence. Soloviov's claim should be denied.

Generally, evidence of drug use admitted to impeach a witness requires a reasonable inference that the witness was under the influence of drugs either at the time of the incident in question or at the time he or she testifies at trial. *State v. Tigano*, 63 Wn.App. 336, 818 P.2d 1369 (1991) (citing *State v. Brown*, 48 Wn.App. 654, 739 P.2d 1199 (1987) (citing 2 C. Torcia, *Wharton on Criminal Evidence*, sec. 459, at 398 (13th ed. 1972)), *State v. Hall*, 46 Wn.App. 689, 732 P.2d 524, *rev. denied*, 108 Wn.2d 1004 (1987), E. Cleary, *McCormick on Evidence*, sec. 45 (3rd ed. 1984), and 5A K. Tegland, *Wash.Prac., Evidence Law and Practice*, sec. 226(4) (3d ed. 1989)). Evidence of a witness's drug use at other times, or of that witness's general drug use or addiction, is usually inadmissible. *Id.* at 344-45 (citing *State v. Renneberg*, 83 Wn.2d 735, 522 P.2d 835 (1974)). "It is well settled in Washington that evidence of drug use is admissible to

impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony.” *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994).

In *Tigano*, this Court upheld the trial court’s exclusion of a witness’s general drug usage as there was no reasonable inference that he was under the influence of drugs at the time of the events he testified to or at the time of trial. *Tigano*, 63 Wn.App. at 345. No witness was able to testify that the witness had used drugs at the time of the events, and thus there was no evidence of drug use that would have affected his ability to perceive. *Id.*

In *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970, (2004), the Supreme Court affirmed the trial court’s decision to prohibit defense from cross-examining a witness about alleged drug use as the defense had no evidence that the witness had used drugs at the time of the events about which he testified. *Thomas*, 150 Wn.2d at 864. Along this same vein, in *Russell, supra*, the Supreme Court affirmed the trial court’s decision allowing cross-examination about a witness’s drug use when the witness had indicated in a pretrial interview that he had consumed alcohol on the night of the murder and that he had had drug and alcohol-related

hallucinations during the time period around the murder. *Russell*, 125 Wn.2d at 83-84.

Thus from our state's jurisprudence it is clear: if there is evidence that a witness consumed drugs or alcohol at the time of the event about which he is to testify, then that evidence is admissible as impeachment evidence tending to call the witness's ability to accurately perceive and remember into question. If no such evidence exists, the witness should not be cross-examined about potential or speculative drug use. Also, a witness's general drug usage, not tied in time to the time of the event about which the witness is testifying, is overly prejudicial and should not be admitted. *Tigano*, 63 Wn.App. at 344.

At the trial below, Soloviov wished to introduce evidence that police found a scale, commonly used to measure drugs, at the victim's residence five days after the crimes occurred. RP 200-03. By proffering this evidence, Soloviov was not attempting to show that the victim had used methamphetamine or another substance on the day of the attack, or the day prior to the attack, in order to show the victim's ability to perceive or his memory of the events may have been compromised. Instead, Soloviov wanted general character evidence before the jury, asking to admit evidence that tended to show that the victim was a drug user in general, with no evidence tying that use to the time or near the time of the

attack. There is no reasonable inference that the victim was under the influence of a drug at the time of the attack because an officer found a scale in his home five days later. *See Tigano*, 63 Wn.App. at 345. Had Soloviov had evidence that the victim had actually used drugs at or near the time of the attack, that would have been relevant and admissible evidence. However, evidence that may or may not show possession of drugs from five days after the event, has no tendency to show the victim's ability to perceive or remember was altered. Thus the trial court properly excluded this evidence and Soloviov's claim on appeal should be denied.

## **II. Soloviov's prior Oregon offenses are comparable to Washington offenses**

Soloviov claims the trial court erred in finding his prior convictions out of the State of Oregon for Assault in the Second Degree and Unlawful Use of a Motor Vehicle were comparable to Washington felony offenses. The prior offenses are comparable to Washington offenses. The trial court properly included Soloviov's prior conviction for Unlawful Use of a Motor Vehicle in his offender score as it is comparable to a Washington theft or possession of stolen property. Soloviov's prior Assault in the Second Degree out of Oregon is comparable to a Washington Assault in the Third Degree and therefore should have been scored as 1 point in calculating Soloviov's offender score . Both offenses are comparable to

Washington felonies and thus should be included in Soloviov's offender score. Because the trial court erroneously found Soloviov's prior Assault in the Second Degree conviction from Oregon was comparable to a Washington Assault in the Second Degree instead of Assault in the Third Degree, the trial court erroneously assigned one extra point to Soloviov's offender score. Soloviov should be resentenced with an offender score of 5.

A sentencing court properly includes an out-of-state prior conviction in a defendant's offender score if the out-of-state conviction is comparable to a Washington conviction. *State v. Olsen*, 180 Wn.2d 468, 325 P.3d 187 (2014); *State v. Arndt*, 170 Wn.App. 373, 320 P.3d 104 (2014); *see also* RCW 9.94A.525(3). In comparing offenses, the court uses a two-part test. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005). In the first step, the court analyzes the legal comparability of the out-of-state offense to a Washington offense by comparing the elements of the out-of-state offense to the most comparable Washington offense. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998). If the elements of the two crimes are the same then the offenses are legally comparable and the court's analysis ends. *Id.* If the elements of the two crimes are not the same they are not legally comparable. *Id.* at 606. When offenses are not legally comparable, the court considers

whether the crimes are factually comparable. *Lavery*, 154 Wn.2d at 255-57. Offenses are factually comparable when the defendant's conduct would have violated a Washington statute. *Morley*, 134 Wn.2d at 606; *State v. Thieffault*, 160 Wn.2d 409, 158 P.3d 580 (2007). "The key inquiry is under what Washington statute could the defendant have been convicted if he or she had committed the same acts in Washington." *State v. McCorkle*, 88 Wn.App. 485, 945 P.2d 736 (1997), *aff'd*, 137 Wn.2d 490, 973 P.2d 461 (1999). In determining factual comparability, the court may rely on facts that were admitted, stipulated, or proved beyond a reasonable doubt. *Lavery*, 154 Wn.2d at 255. In addition, in comparing statutes, our courts are to apply the law existing at the time of the conviction. *Lavery*, 154 Wn.2d at 255. This Court reviews the trial court's comparability determination de novo. *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012).

A. SOLOVIOV'S UNLAWFUL USE OF MOTOR VEHICLE  
CONVICTION IS COMPARABLE TO A WASHINGTON OFFENSE

Soloviov's claim that his prior conviction out of the state of Oregon for Unlawful Use of a Motor Vehicle is not comparable to a Washington felony rests on his claim that in order to be comparable to a Washington felony, the taking of the vehicle in Oregon had to have been done intentionally and that it could only have been comparable to the

Washington crime of Taking a Motor Vehicle Without Permission. *See* Br. of Appellant, p. 30. However, this analysis fails to consider the actual crimes the sentencing court found Soloviov's prior comparable to: Theft and Possession of Stolen Property (a motor vehicle), and fails to consider the elements of those crimes. RP 804. At sentencing the trial court explicitly found Soloviov's Oregon prior was comparable to the Washington "counterpart" of "theft or possession," and references the State's analysis. RP 804. In its sentencing memorandum to the trial court, the State argued that Soloviov's prior vehicle conviction from Oregon was comparable to both theft of a motor vehicle and possession of a stolen motor vehicle. CP 173-75. These two crimes do not require an intent element as Soloviov claims. The State's analysis then, and the trial court's decision, was correct.

At sentencing and here on appeal, the State proffers that Soloviov's unlawful use of a motor vehicle offense is *factually* comparable to a Washington felony. The State agrees that the offense is not legally comparable. The vehicle specific crimes related to theft and possessing stolen property went into effect in Washington in 2007. Soloviov's prior from Oregon occurred in 2002. Thus, the proper statutes to analyze for comparability purposes are Theft and Possession of Stolen Property, keeping in mind the appropriate question here is what crime

would Soloviov have committed had he engaged in the same conduct here in Washington?

To convict a defendant of Possession of Stolen Property in the First Degree under the version of RCW 9A.56.150 that was in effect in 2002, the State had to prove that the defendant possessed stolen property which exceeded one thousand five hundred dollars in value. Former RCW 9A.56.150. Possessing stolen property meant “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1). Soloviov’s guilty plea statement from his Oregon conviction for Unlawful Use of a Motor Vehicle stated that “on May 31, 2002, I knew I took and operated a motor vehicle that did not belong to me, and it was worth more than \$10,000.” CP 182. In analyzing the facts of Soloviov’s statement in Oregon, it is clear that his behavior could have been prosecuted as a Possession of Stolen Property in the First Degree in the State of Washington in 2002. He admitted the property was valued at \$10,000, which is well above the \$1,500 requirement in Washington at the time. He indicated he took and operated a motor vehicle that did not belong to him. That indicates possession of property that he knew was stolen as he was the one who took it, and it indicates withholding and

appropriating that property to his own use, thus for the use of someone other than the true owner. The factual comparison here is evident: Soloviov admitted to conduct which is comparable to a 2002 Possession of Stolen Property in the First Degree. His claim that the State did not prove he had the intent to steal in his Oregon case is erroneous, as his prior conviction is not comparable to a crime that has intent as a mens rea, but rather requires he know the property was stolen. As Soloviov's guilty plea statement in Oregon admits to stealing the property, he clearly has knowledge it was stolen. Thus all the elements of Possession of Stolen Property in the First Degree are met and the trial court property included this crime in Soloviov's offender score.

Soloviov's prior crime is also comparable to Theft in the First Degree. In 2002 to prove a defendant guilty of Theft in the First Degree in Washington, the State had to prove that a defendant committed theft of property which exceeded one thousand five hundred dollars in value. Former RCW 9A.56.030. Theft means to "wrongfully obtain or exert unauthorized control over the property... of another with intent to deprive him or her of such property...." RCW 9A.56.020(1)(a). In applying these elements to Soloviov's statement in his Oregon guilty plea it is clear that his conduct in Oregon was comparable to the Washington crime of Theft in the First Degree. Soloviov took property valued at \$10,000 that did not

belong to him, and used the property, thus exerting unauthorized control over the property and depriving the true owner of it. His admitted conduct meets the elements of a Washington felony and thus was properly included in the offender score.

The trial court applied the applicable law and correctly found that Soloviov's prior conviction for unauthorized use of a motor vehicle was factually comparable to a Washington felony. Soloviov's prior was appropriately included in his offender score and the trial court should be affirmed.

**B. SOLOVIOV'S ASSAULT IN THE SECOND DEGREE CONVICTION IS COMPARABLE TO A WASHINGTON OFFENSE**

Soloviov also claims the trial court erred in including his prior conviction out of the state of Oregon for Assault in the Second Degree. As with his conviction for unlawful use of a motor vehicle, Soloviov's Oregon conviction for Assault is comparable to a Washington felony and should count in his offender score.

In 2009, Soloviov was convicted of Assault in the Second Degree with a Firearm in the state of Oregon. CP 204-08. The charging document for his Oregon conviction alleged that Soloviov "did unlawfully and knowingly cause physical injury to [victim] by means of a deadly weapon, to-wit: a firearm, by using and threatening to use a firearm against

[victim].” CP 202. Soloviov entered a guilty plea to this offense, thus admitting to these facts. CP 204-06. Had Soloviov engaged in the same conduct in Washington he would have been convicted of an Assault in the Third Degree and thus his prior Oregon conviction is comparable to a Washington felony and was properly included in his offender score.

In 2008, RCW 9A.36.031 provided that a person was guilty of Assault in the Third Degree if that person “with criminal negligence, cause[d] bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm....” RCW 9A.36.031(1)(d). This provision is identical to the current version of RCW 9A.36.031. The facts of Soloviov’s Oregon conviction show that he “unlawfully and knowingly cause[d] physical injury.” Our Assault in the Third Degree requires a showing that he, with criminal negligence, cause “bodily harm” to another person. “Bodily harm” means “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a). ORS 161.015(7) defines “physical injury” as “impairment of physical condition or substantial pain.” Both statutes contain “impairment of physical condition,” and Washington’s definition is actually broader in that “bodily harm” only requires “physical pain,” whereas Oregon’s definition of “physical injury” requires “substantial pain.” Thus we can be assured that if Soloviov caused “physical injury” as

defined in Oregon, then he definitely caused “bodily harm” as defined in our State as Oregon’s statute is narrower and fully subsumed by our State’s definition. Therefore, it is clear that Soloviov caused the victim in his Oregon Assault 2 conviction “bodily harm” as Washington defines it.

Washington’s Assault in the Third Degree requires that the “bodily harm” be caused “by means of a weapon or other instrument or thing likely to produce bodily harm.” RCW 9A.36.031(1)(d). A firearm is always a “deadly weapon,” and thus is of course a “weapon” as contemplated by RCW 9A.36.031(1)(d). *See* RCW 9A.04.110(6) (defining “deadly weapon” as “any ...loaded or unloaded firearm...”). RCW 9.41.010(10) defines firearm as “a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” ORS 166.210(3) defines “firearm” as “a weapon...which is designed to expel a projectile by the action of powder.” Once again, the Oregon definition of firearm is narrower than the Washington definition; in Oregon, the weapon must expel a projectile by the action of powder, whereas in Washington the projectile must be fired by any explosive, including gunpowder, but not limiting it to powder. Therefore we can know that if an offender used a “firearm” as defined in Oregon, then that instrument would also always be a “firearm” in Washington.

With those definitions in mind then we know that Soloviov caused “bodily harm” by means of a “firearm,” and in Washington a “firearm” is always a deadly weapon and thus will always be a “weapon” under RCW 9A.36.031(1)(d). We therefore have Soloviov causing “bodily harm” by means of a weapon. The only remaining element in Assault in the Third Degree is whether Soloviov acted with criminal negligence. Soloviov pled guilty to “unlawfully and knowingly” causing physical injury by means of a firearm. In Washington, when a person acts “knowingly” he also acts with criminal negligence. RCW 9A.08.010(2). Specifically, our laws allow that when “criminal negligence suffices to establish an element of an offense, such element also is established if a person acts...knowingly....” RCW 9A.08.010(2). ORS 161.085 defines “knowingly” as when “a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.” Once again, the Oregon statute is narrower than the Washington statute when it comes to knowledge. In Washington, to prove knowledge, we have to show that a person either is aware of a fact or circumstance or that he has information which would lead a reasonable person in the same situation to believe that facts exist. RCW 9A.08.010(1)(b). Oregon’s version of knowledge does not include the reasonable person standard and thus we can know that Soloviov admitted that he personally acted

knowingly, in that he had awareness of the conduct he engaged in. In Washington Soloviov also would have acted knowingly as he was aware of the fact or circumstance of his conduct. Therefore, Soloviov acted knowingly under Washington's definition and pursuant to RCW 9A.08.010(2) Soloviov is deemed to have acted with criminal negligence.

All the elements of Assault in the Third Degree are met by the conduct that Soloviov admitted to in Oregon: he knowingly caused bodily harm by means of a firearm. This shows that Soloviov acted with criminal negligence and caused bodily harm to another person by means of a weapon, thus violating RCW 9A.36.031(1)(d). Soloviov would have been convicted of Assault in the Third Degree for engaging in the same behavior in Washington.

C. SOLOVIOV SHOULD BE RESENTENCED WITH AN OFFENDER SCORE OF 5

The trial court below found Soloviov's Oregon conviction for Assault in the Second Degree was comparable to a Washington Assault in the Second Degree, thus scoring it as a violent offense and assigning two points to this prior conviction. RCW 9.94A.525(8). As Soloviov's Oregon assault conviction is properly comparable to a Washington Assault in the Third Degree, not a violent offense, it should have been assigned one point. RCW 9.94A.525(7). Accordingly, Soloviov's offender score should

have been calculated as a 5 instead of a 6; this case should be remanded to impose a sentence based on his accurate offender score.

### **III. Soloviov received effective assistance of counsel**

Soloviov claims his attorney was ineffective for failing to request that the trial court not apply the burglary anti-merger statute and argue that his crimes constituted same criminal conduct. However, Soloviov has not shown deficiency or prejudice in light of the burglary anti-merger statute; his claim fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive

the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kylo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if

the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing

court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

RCW 9A.52.050, known as the burglary anti-merger statute, states that anyone who commits any other crime in the course of a burglary may be punished for both crimes. In *State v. Lessley*, 118 Wn.2d 773, 827 P.2d 996 (1992), the Supreme Court held that the burglary anti-merger statute allowed a trial court to punish burglary and another crime committed at the same time separately, even if the crimes constituted the same criminal conduct. *Lessley*, 118 Wn.2d at 781-82.

The trial court below had independent authority to punish both Soloviov's Burglary and Assault separately and had the discretion to punish both the Burglary and Assault crimes even if they constituted same criminal conduct. *Id.* Soloviov makes no argument as to why the trial court would have declined to exercise its discretion under the burglary anti-merger statute if counsel had raised the idea of applying a same criminal conduct analysis to his crimes. Soloviov appears to argue on appeal that had the issue been raised, the trial court would have applied the same criminal conduct analysis as his two offenses clearly meet the definition of same criminal conduct. However, Soloviov fails to appreciate the trial court's discretion *not* to apply the same criminal conduct analysis by virtue of the anti-merger statute. At sentencing, the trial court indicated it

started its sentencing analysis with the presumption of a midrange sentence but found the “violent nature of the crime” and other factors involved in this case warranted a high-end sentence. RP 822-23. The trial court therefore sentenced Soloviov to the top of the sentencing range. RP 823; CP 275-88. Given that exercise of discretion, the trial court’s clear belief that these crimes deserved more punishment than others of a similar nature, there is no reasonable probability that the trial court would have exercised its discretion to score the offenses together, thus choosing not to apply the burglary anti-merger statute. Soloviov fails to meet his burden of showing deficient performance that prejudiced him. His claim fails.

#### **CONCLUSION**

Soloviov’s claim that the trial court erred in failing to allow him to admit irrelevant and prejudicial evidence of the victim’s general drug use is without merit. The trial court properly considered the proffered evidence and properly found it was more prejudicial than probative pursuant to ER 403. Soloviov also received effective assistance of counsel at trial and sentencing. The trial court properly included Soloviov’s prior Oregon convictions in his offender score as they are comparable to Washington felonies, but erroneously assigned two points instead of one point to his prior Assault in the Second Degree. Accordingly, Soloviov

should be resentenced with an offender score of 5. The trial court should be affirmed in all other respects.

DATED this 4<sup>th</sup> day of MAY, 2018.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

  
\_\_\_\_\_  
RACHAEL A. ROGERS, WSBA #37878  
Senior Deputy Prosecuting Attorney  
OID# 91127

**CLARK COUNTY PROSECUTING ATTORNEY**

**May 04, 2018 - 10:42 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50631-9  
**Appellate Court Case Title:** State of Washington, Respondent v Ruben Soloviov, Appellant  
**Superior Court Case Number:** 16-1-00672-8

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