

FILED  
September 30, 2014  
Court of Appeals  
Division III  
State of Washington

NO. 32508-3-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**ANTONIO ZAMUDIO, JR.,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

1. Antonio Zamudio Jr.'s offender score was miscalculated.
2. Mr. Zamudio did not receive effective assistance of counsel at sentencing.
3. The State failed to prove, beyond a reasonable doubt, that the firearm was operable for purposes of the firearm enhancement.
4. The State failed to establish, beyond a reasonable doubt, fear and apprehension on the part of the named victim.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Does a stipulation to criminal history preclude an attack upon a miscalculated offender score:
2. Was defense counsel ineffective when he did not raise an issue of washout of class C felonies at the sentencing hearing?
3. Do the facts and circumstances of the case establish that the State proved that the firearm was operable for purposes of the firearm enhancement?

4. Did the State meet the requirements of establishing assault by apprehension and fear of bodily injury when the alleged victim did not testify at trial and the only evidence was as to demeanor?

### **STATEMENT OF CASE**

Deputy DeMyer of the Douglas County Sheriff's Office responded to an incident at the Rock Island gas station on November 12, 2013. Dispatch advised him that a gun had been pointed at someone in the parking lot. (RP 45, ll. 3-7; ll. 11-24)

The person who pointed the gun left the area driving a white Toyota Tundra pulling a white trailer. It proceeded eastbound on SR-28. (RP 46, ll. 6-10; RP 91, ll. 4-12; RP 92, ll. 1-6; ll. 17-24)

Brian Lumsden was in the parking lot smoking a cigarette. He was talking to a trucker who was playing with his dog. He later identified Mr. Zamudio as the individual who pointed a gun at the trucker. Mr. Zamudio was both the registered owner and driver of the pickup. (RP 48, l. 25 to RP 49, l. 2; RP 61, ll. 4-11; RP 87, ll. 7-9; ll. 19-20; ll. 23-24; RP 98, ll. 1-8)

David Berndt was the trucker. He appeared “a little frightened” according to Mr. Lumsden. Sergeant Downs described Mr. Berndt as “serious”. (RP 95, ll. 10-16; RP 109, ll. 14-15; RP 119, ll. 14-19; RP 140, ll. 19-24)

Deputy DeMyer later stopped the Tundra. When he opened the back passenger door to see if anyone else was inside he saw two (2) guns on the floor behind the passenger seat. A search warrant was obtained and the guns were seized. One was a .40 caliber handgun. He arrested Mr. Zamudio for unlawful possession of a firearm first degree (RP 51, ll. 7-17; RP 52, ll. 16-20; RP 61, ll. 21-24; RP 63, ll. 22-23; RP 64, ll. 22-24; RP 77, ll. 1-3)

An Information was filed on November 15, 2013 charging Mr. Zamudio with second degree assault, unlawful possession of a firearm first degree and possession of stolen property second degree. The assault count carried a firearm enhancement. (CP 4)

An Amended Information was filed on November 27, 2013. It added an alternative means of committing second degree assault and counts of possession of a stolen firearm, possession of an unlawful firearm, and a second count of possession of stolen property second degree. (CP 8)

A Second Amended Information was filed on May 6, 2014. Counts I and II remained the same. Count III was redesignated as possession of an unlawful firearm and Count IV as possession of stolen property second degree. (CP 21)

Mr. Berndt did not testify at trial.

A jury found Mr. Zamudio guilty of second degree assault and unlawful possession of a firearm first degree. It answered the Special Verdict Form that he was armed with a firearm at the time of the assault. (CP 50; CP 51; CP 52)

Judgment and Sentence was entered on May 9, 2014. Mr. Zamudio's offender score was calculated as an eight (8). Defense counsel agreed to Mr. Zamudio's criminal history. The trial court sentenced him to a total of one hundred and twenty (120) months. (CP 53; RP 251, ll. 16-18)

Mr. Zamudio filed his Notice of Appeal on May 27, 2014. (CP 69)

### **SUMMARY OF ARGUMENT**

Mr. Zamudio's offender score was miscalculated. His offender score is two (2) as opposed to eight (8). Defense counsel was ineffective at the sentencing hearing. He needs to be resentenced.

The State failed to prove, beyond a reasonable doubt, that the firearm was operable. In the absence of such proof, the firearm enhancement cannot be utilized. Mr. Zamudio needs to be resentenced.

The State failed to prove, beyond a reasonable doubt, that Mr. Berndt had a reasonable apprehension and fear of bodily injury. The testimony of Sergeant Downs and Mr. Lumsden is insufficient to support the conviction. Mr. Zamudio needs to be resentenced.

## **ARGUMENT**

### **I. OFFENDER SCORE**

“A sentencing court acts without statutory authority under the Sentencing Reform Act of 1981 when it imposes a sentence based on a miscalculated offender score.” *Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

Mr. Zamudio’s offender score was miscalculated. The fact that defense counsel agreed to his criminal history does not impact the calculation of the offender score.

Mr. Zamudio’s criminal history is set forth below:

	<b>Crime</b>	<b>Date of Crime</b>	<b>Date of Sentence</b>	<b>Sentencing Court (County &amp; State)</b>	<b>A or J Adult, Juv.</b>
1	Delivery of Methamphetamine	08/14/04	<b>02/02/05</b>	Chelan, WA	A
2	Possessino of Methamphetamine	01/16/04	03/08/04	Chelan, WA	A
3	Escape Second Degree	09/04/01	08/08/01	Chelan, WA	A
4	Possession of Methamphetamine	06/09/01	08/08/01	Chelan, WA	A
5	Theft Second	05/01/03	07/30/03	Chelan, WA	A
6	Theft Second Degree	09/29/98	03/16/99	Chelan, WA	J
7	Luring	09/06/95	01/05/98	Chelan, WA	J
8	Attempting to Elude a Pussuing Police Vehicle	09/04/01	02/12/01	Chelan, WA	A

Mr. Zamudio's last conviction was for a class B felony on February 2, 2005. It counts in the offender score.

Mr. Zamudio's juvenile convictions and other adult convictions are all class C felonies.

RCW 9.94A.525(1) provides: "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed."

There can be no argument that Mr. Zamudio's prior convictions existed prior to May 9, 2014. However, the offender score is miscalculated due to the fact that prior convictions washed out.

RCW 9.94A.525(2)(c) provides, in part:

... [C]lass C prior felony convictions ... shall not be included in the offender score if, since the last date of release from confinement ... pursuant to a felony conviction ... or entry of judgment and sentence, the offender had spent five years in the community without committing any crime that subsequently results in a conviction.

Mr. Zamudio's last conviction was February 2, 2005. He contends that all of his class C felonies washed out as of February 2, 2010.

The State did not introduce any certified copies of Judgment and Sentences to indicate a lack of washout. Therefore, Mr. Zamudio contends that his offender score should be calculated as a two (2).

An offender score of two (2) on unlawful possession of a firearm first degree has a standard range of twenty-six (26) to thirty-four (34) months. (Appendix "A")

An offender score of two (2) on a second degree assault conviction has a standard range sentence of twelve plus (12+) to fourteen (14) months. (Appendix "B")

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, **requires the sentencing court to calculate a defendant's offender score** by the sum of points accrued under RCW 9.94A.525. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). ... The State is required to prove the defendant's criminal history to the sentencing

judge by a preponderance of the evidence, or the court may rely on the defendant's stipulation or acknowledgment of prior convictions to calculate the offender score. RCW 9.94A.441, .530(2); *In re Per. Restraint of Cadwallader*, 155 Wn.2d 867, 873-74, 123 P.3d 456 (2005).

But "a defendant cannot, ... agree to a sentence in excess of that authorized by statute." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). A sentence based on an incorrect offender score calculation is a sentence in excess of that authorized by statute. *Id.*

*State v. Malone*, 138 Wn. App. 587, 593, 157 P.3d 909 (2007). (Emphasis supplied.)

The record does not reflect any independent determination by the trial court as to the correct offender score. A defendant's criminal history does not, in and of itself, lead to a correct determination of an offender score. In Mr. Zamudio's case, washouts occurred and the offender score has been miscalculated.

## **II. INEFFECTIVE ASSISTANCE**

Defense counsel is ineffective if he/she fails to challenge a miscalculated offender score and the defendant is prejudiced as a result. Prejudice occurs if the defendant's sentence is in excess of that authorized by statute. *See: State v. Levy*, 156 Wn.2d 709, 729-30, 132 P.3d 1076 (2006).

### III. FIREARM ENHANCEMENT

The State failed to prove the firearm enhancement beyond a reasonable doubt. No testimony was presented concerning the operability of the .40 caliber handgun.

The fact that ammunition may be in a weapon does not indicate that the weapon is functional. The only way to determine if a weapon is functional is to test it.

In his rebuttal argument the deputy prosecutor admitted that he did not know if the gun was capable of being fired. (RP 231, ll. 4-13)

... [I]n order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a “firearm”: “a weapon or device from which a projectile may be fired by an explosive such as gun powder.” **11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01** (Second ed. Supp. 2005) (WPIC). We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement. *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

*State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008).

In the absence of proof of operability/functionality, Mr. Zamudio's firearm enhancement must be removed and he is entitled to be resentenced.

#### **IV. SECOND DEGREE ASSAULT**

The jury was instructed on the third alternative of the assault definition as contained in WPIC 35.50. (Instruction 9; CP 37; Appendix "C")

The third alternative involves "intent to create in another apprehension and fear of bodily injury."

Mr. Berndt was the alleged victim of the assault. He was not subpoenaed for trial. No testimony was presented concerning his state of mind. Rather, minimal demeanor evidence was introduced through two (2) other witnesses.

Whether there is an assault in a given case depends more upon the apprehensions created in the mind of the person assaulted than upon what may be the secret intentions of the person committing the assault. In *Howell v. Winters*, 58 Wash. 436, 108 Pac. 1077, it was said:

"The presence or absence of an assault depends more upon the apprehension created in the mind of the person assaulted than upon the undisclosed intentions of the person committing the assault."

*Allen v. Hannaford*, 138 Wash. 423, 425, 244 P. 700 (1926).

No evidence was presented to indicate what was in Mr. Berndt's mind. He appeared "a little frightened." He appeared "serious."

Instruction 9 goes on to state that the assaultive act must "in fact create [...] in another a reasonable apprehension and imminent fear of bodily injury."

"... [T]he controlling factor is the state of mind of the assaulted person." *State v. McCollum*, 17 Wn.(2d) 85, 90, 139 P.(2d) 165 (1943).

The testimony presented by the State does not meet its burden of proof. No one knows what was in Mr. Berndt's mind because he did not testify. The jury would have to speculate as to whether or not he in fact experienced "apprehension and fear of imminent bodily injury."

Mr. Zamudio contends that the evidence presented was insufficient to prove each and every element of second degree assault, as charged, beyond a reasonable doubt.

"... [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*."

*State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), *quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).

## CONCLUSION

When a trial court sentences a defendant on a miscalculated offender score it exceeds its statutory authority. Neither Mr. Zamudio nor defense counsel objected to the offender score. However, calculation of an offender score is independent of any agreement as to a defendant's criminal history.

The washout provisions of RCW 9.94A.525(2)(c) do not appear to have been considered by the trial court, the prosecuting attorney or defense counsel.

Defense counsel was ineffective in not raising the issue of washout of criminal history. Mr. Zamudio was prejudiced as can be easily seen in the vast difference between the sentencing range for offender scores of two (2) and eight (8).

In the absence of documentation to support that no washout occurred, Mr. Zamudio contends that washouts are presumed and he is entitled to be resentenced with an offender score of two (2).

The State failed to prove the operability of the firearm. Thus, the firearm enhancement cannot be imposed. Mr. Zamudio is entitled to be resentenced without that enhancement.

The State failed to prove, beyond a reasonable doubt, that Mr. Berndt had a reasonable apprehension and fear of bodily injury. Other individuals cannot testify concerning Mr. Berndt's state of mind in the absence of some type of statement by him indicating fear or apprehension. His demeanor of being "serious" and "a little frightened" does not meet the standard of proof beyond a reasonable doubt. Mr. Zamudio requests that his second degree assault conviction be reversed and dismissed.

If the assault conviction is reversed Mr. Zamudio's offender score if then reduced to one (1).

Mr. Zamudio requests that his case be remanded to the trial court for resentencing based upon the arguments contained in this brief.

DATED this 30th day of September, 2014.

Respectfully submitted,

s/ Dennis W. Morgan

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## APPENDIX “A”

# UNLAWFUL POSSESSION OF A FIREARM FIRST DEGREE

RCW 9.41.040(1)  
CLASS B – NONVIOLENT

## OFFENDER SCORING RCW 9.94A.525(7)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 176.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 174.

### ADULT HISTORY:

Enter number of felony convictions ..... x 1 = \_\_\_\_\_

### JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions ..... x 1 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... x ½ = \_\_\_\_\_

### OTHER CURRENT OFFENSES:

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other felony convictions ..... x 1 = \_\_\_\_\_

### STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

### SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
<b>LEVEL VII</b>	17.5m 15 - 20	24m 21 - 27	30m 26 - 34	36m 31 - 41	42m 36 - 48	47.5m 41 - 54	66m 57 - 75	78m 67 - 89	89.5m 77 - 102	101.5m 87 - 116

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 26 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 170 for standard range adjustments.
- ✓ For sentencing alternatives, see page 163.
- ✓ For community custody eligibility, see page 171.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 168.
- ✓ Each firearm possessed under this section is a separate offense.
- ✓ The offender shall be sentenced according to RCW 9.94A.589(1)(c) if the offender is convicted of Unlawful Possession of a Firearm 1 or 2 (RCW 9.41.040) and for felonies Theft of a Firearm or Possession of a Stolen Firearm, or both, as current offenses.
- ✓ If the present conviction is for Unlawful Possession of a Firearm 1 or 2 and felonies Theft of a Firearm or Possession of a Stolen Firearm, or both, charged under RCW 9.41.040, other current convictions for Unlawful Possession of a Firearm 1 or 2, Possession of a Stolen Firearm or Theft of a Firearm may not be included in the computation of the offender score per RCW 9.94A.589(1)(c). The offender will serve consecutive sentences for these particular offenses.

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

## APPENDIX “B”

# ASSAULT SECOND DEGREE

RCW 9A.36.021(2)(a)  
CLASS B - VIOLENT

## OFFENDER SCORING RCW 9.94A.525(8)

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 182.

### ADULT HISTORY:

Enter number of serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_

Enter number of nonviolent felony convictions ..... x 1 = \_\_\_\_\_

### JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions ..... x 2 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... x 1/2 = \_\_\_\_\_

### OTHER CURRENT OFFENSES:

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_

Enter number of other nonviolent felony convictions ..... x 1 = \_\_\_\_\_

### STATUS:

Was the offender on community custody on the date the current offense was committed? ..... + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

### SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
<b>LEVEL IV</b>	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	61.5m 53 - 70	73.5m 63 - 84

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 26 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 170 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 173.
- ✓ For sentencing alternatives, see page 163.
- ✓ For community custody eligibility, see page 171.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 168.

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## APPENDIX “C”

No. 9

An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

0-000000037

**NO. 32508-3-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	DOUGLAS COUNTY
Plaintiff,	)	NO. 13 1 00192 0
Respondent,	)	
	)	<b>CERTIFICATE OF SERVICE</b>
v.	)	
	)	
ANTONIO ZAMUDIO, JR.,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

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I certify under penalty of perjury under the laws of the State of Washington that on this 30th day of September, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III  
Attn: Renee Townsley, Clerk  
500 N Cedar St  
Spokane, WA 99201

E-FILE

CERTIFICATE OF SERVICE

DOUGLAS COUNTY PROSECUTOR'S OFFICE

Attention: Steven Michael Clem

PO Box 360

Waterville, WA 98858-0360

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CERTIFICATE OF SERVICE