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Supreme Court No. _____
COA No. 49443-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD J. STEINER,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Edward Steiner, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Steiner seeks review of the unpublished opinion of the Court of Appeals in cause number 49443-4-II, 2018 WL 1920410, filed April 24, 2018. A copy of the decision is found at Attachment A at pages A-1 through A-29.

C. ISSUES PRESENTED FOR REVIEW

1. 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). Was Mr. Steiner improperly sentenced to an offender score of "6" where his prior Colorado conviction for attempted second degree assault was not legally or factually comparable to a Washington felony?

2. Mr. Steiner was denied his Sixth Amendment right to effective assistance of counsel when defense counsel stipulated to the inclusion of the Colorado conviction in his offender score without a comparability analysis.

D. STATEMENT OF THE CASE

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). The State alleged that in Aberdeen, Washington on February 4, 2016, Mr. Steiner took a projectile stun gun (Taser) from Kristi Lougheed, a police officer for the Aberdeen Police Department, and assaulted Officer Lougheed with her own Taser. CP 1-2. Following a jury trial he was convicted of third degree assault and disarming a law enforcement officer.

At sentencing the State presented evidence of Mr. Steiner's prior convictions for second degree arson in Nevada and attempted second degree assault (bodily fluids) in Colorado. CP 94-100. Defense counsel did not object to the State's calculation of his offender score at "6" points and conceded that the crimes were comparable to the Washington felonies of second degree arson and custodial assault, respectively. 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.

Steiner appealed his convictions for third degree assault and for disarming a police officer on several grounds, including his contention (1) the trial court erred by including his Colorado conviction for attempted second degree assault in his offender score and (2) that he received ineffective assistance of counsel because his trial counsel failed to object to the inclusion of the Colorado conviction in his offender score.

By unpublished opinion filed April 24, 2018, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion. Steiner now petitions this Court for discretionary review pursuant to RAP 13.4(b)(1), (2).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b)(1), (2). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. THE COURT OF APPEALS ERRED BY AFFIRMING THE INCLUSION OF A PRIOR CONVICTION FOR ATTEMPTED SECOND DEGREE ASSAULT IN COLORADO IN STEINER'S OFFENDER SCORE

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 Court of Appeals erred by finding that Mr. Steiner's Colorado conviction for attempted second degree assault was factually comparable to custodial assault. Slip. op. at 19.

To determine whether a foreign offense is comparable to a Washington offense, the reviewing court applies a two-part test. See ***In re Pers. Restraint of Lavery***, 154 Wash.2d 249, 255, 111 P.3d 837 (2005). First, the court compare the foreign offense's elements with the comparable

Washington offense's elements to determine whether they are legally comparable. ***State v. Ford***, 137 Wash.2d 472, 479, 973 P.2d 452 (1999). Offenses are legally comparable if their elements are substantially similar or if the foreign offense is not broader than the Washington offense. See ***Ford,*** 137 Wash.2d at 479; ***State v. Jordan***, 180 Wash.2d 456, 461, 325 P.3d 181 (2014).

If the offenses are not legally comparable, the court then examines whether the offenses are factually comparable. ***State v. Thomas***, 135 Wash.App. 474, 480, 144 P.3d 1178 (2006). Offenses are factually comparable if the defendant's conduct constituting the foreign offense, as evidenced by the undisputed facts in the foreign record, would constitute the Washington offense. ***Thomas***, 135 Wash.App. at 480. 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. ***State v. Morley***, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); ***Lavery***, 154 Wn.2d at 255. In this inquiry into factual comparability, the trial court can consider only facts proved to a trier of fact beyond a reasonable doubt or those to which the defendant admitted or stipulated. ***Thomas***, 135 Wash.App. at 482, 144 P.3d 1178.

Here, Steiner pleaded guilty to attempted assault in the second degree in Colorado. The Court of Appeals found that a Colorado conviction for attempted second degree assault is not legally comparable to a Washington felony. Slip. op. at 19. When examining factual comparability, the trial court can consider only facts proved to a trier of fact beyond a reasonable doubt or those to which the defendant admitted or stipulated. ***Thomas***, 135 Wash.App. at 482, 144 P.3d 1178.

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 (salvia 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.

The Court of Appeals stated that "[b]ecause Washington recognizes attempted battery as a form of assault, Steiner's actions constitute a custodial assault. Therefore, the Colorado conviction is considered factually comparable to a custody assault in Washington." Slip. op. at 20.

Because assault is not defined in the criminal code, courts have turned to the common law for its definition. Three definitions of assault are recognized in Washington: (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 (2009). The first means of assault requires a completed battery; intentionally touching or striking someone in a harmful or offensive manner. See ***State v. Humphries***, 21 Wash.App. 405, 409, 586 P.2d 130 (1978) (noting that battery is consummated assault). The second means of assault includes proof of an attempt to inflict bodily injury within its definition. The third means of assault requires unlawful force with intent to create in the victim apprehension and fear of bodily injury, which results in reasonable apprehension and imminent fear of bodily injury even though the defendant did not intend to inflict bodily injury. ***State v. Byrd***, 125 Wash.2d 707, 713, 887 P.2d 396 (1995). "Bodily injury" is defined RCW 9A.04.110(4)(a) as physical pain or injury, illness, or an impairment of physical condition. Accordingly, the present case implicates the attempted battery and apprehension of harm definitions of assault. In this case, the evidence presented was insufficient to satisfy the "physical pain, injury, illness or impairment" definition of bodily injury; the State produced no evidence of harmful or offensive contact with

Officer Trainor by attempted spitting). The State did not submit evidence that Steiner's attempted spitting caused apprehension of harm. Consequently, the State failed to provide sufficient evidence to prove with a preponderance of the evidence that Steiner's violation of Colorado's assault is factually comparable to Washington's custodial assault statute.

Mr. Steiner was denied his right to effective assistance of counsel where defense counsel stipulated, without a comparability analysis, that the Colorado conviction was factually comparable to a Washington felony.

Defense counsel 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. Counsel's failure to object constitutes ineffective assistance of counsel. ***State v. Thiefault***, 160 Wn.2d 409, 417, 158 P.3d 580 (2007).

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced error in the unpublished opinion of the court below.

DATED: May 24, 2018.

Respectfully submitted,
THE TILLER LAW FIRM

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Of Attorneys for Edward Steiner

CERTIFICATE OF SERVICE

The undersigned certifies that on May 24, 2018, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Jason Feilding Walker, also copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

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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 May 24, 2018.

PETER B. TILLER

ATTACHMENT A

Filed
Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDWARD STEINER, Appellant.	No. 49443-4-II UNPUBLISHED OPINION

SUTTON, J. — Edward Steiner appeals his convictions for third degree assault and for disarming a police officer. Steiner argues that the trial court erred by failing to sua sponte order a second competency evaluation to stand trial. Steiner also appeals his sentence arguing that (1) he received ineffective assistance of counsel because his counsel failed to argue that his convictions were the same criminal conduct and (2) the trial court erred by including his Colorado conviction for attempted second degree assault in his offender score. The trial court did not err by failing to reevaluate Steiner's competency and the trial court properly calculated Steiner's offender score.

Steiner also raises 14 categories of claims in his Statement of Additional Grounds (SAG).[1] Steiner's SAG claims lack merit. Accordingly, we affirm Steiner's convictions and sentence.

[1] RAP 10.10. In addition to the SAG claims addressed in the body of our opinion, Steiner repeatedly references documents he alleges that his trial counsel improperly withheld from him. However, towards the end of his SAG, Steiner acknowledges that he eventually received the documents from his attorney. Therefore, we do not address this claim any further.

FACTS

On February 5, 2016, the State charged Steiner with assault in the third degree and disarming a police officer. The same day the trial court issued a warrant for Steiner's arrest. Steiner was arraigned on February 22.

On April 11, the trial court entered an order setting Steiner's trial date for May 3. On April 25, Steiner's attorney made a motion for a competency evaluation. Steiner's attorney expressed concern about Steiner's ability to assist in his own defense. The trial court agreed that there was reason to doubt Steiner's competency and ordered a competency evaluation. On April 25, 26, and 27, Steiner sent letters directly to the trial court complaining about his attorney and objecting to the competency evaluation. Steiner also asserted that his attorney was not obtaining video and other evidence that Steiner believed was necessary for his case.

On May 9, the trial court held a hearing to address Steiner's competence to stand trial. After receiving the evaluation from Western State Hospital, the State and Steiner's attorney agreed that Steiner was competent. The trial court also agreed and entered an order finding Steiner competent. Steiner's counsel, Christopher Baum, also made a motion to withdraw because of a breakdown in the attorney-client relationship. Steiner agreed with Baum's motion because he felt Baum had been "sneaky" by moving for the competency evaluation. I Verbatim Report of Proceeding (VRP) at 18. The trial court granted the motion to withdraw and appointed a new attorney for Steiner. Because of Baum's withdrawal, the trial court set a new time for trial commencement date and set Steiner's trial for July 6.

On May 25, Steiner sent another letter to the trial court. Steiner requested a court-appointed private investigator to investigate Steiner's belief that evidence was being tampered with and the case was based on fabricated evidence. Steiner also complained about the continued delay in getting evidence he wanted to support his defense and included a second request for a court-appointed investigator.

On June 20, the trial court held a pretrial conference. The State filed a motion to continue because the primary witness and victim, Officer Kristi Lougheed, were unavailable due to a previously scheduled vacation. Steiner objected because he had already been in custody for approximately 140 days. The trial court found that there was no prejudice to Steiner's defense other than his continued incarceration. The trial court granted the State's motion to continue and set a new trial date for August 9.

On July 4, Steiner sent another letter to the trial court. Steiner complained that he was not permitted to have his court-appointed private investigator's contact information. He also requested that Officer Kristi Lougheed be given a blood test and the results be forwarded to him. Finally, he noted that he had received a letter from the Aberdeen Police Department stating they no longer had the jail video from Steiner's booking.

On July 19, Steiner sent the trial court another letter. Steiner stated that he was still unable to get videos and photos that he had been requesting as evidence. Steiner also alleged that he had recently watched the police video of the incident and he believed it had been fabricated.

On July 21, Steiner sent another letter to the trial court. Steiner continued to express concerns about the failure to obtain his own evidence. Steiner was also upset about the continuances in his case.

On August 9, the trial court began jury selection for Steiner's case. After a brief recess, the trial court informed the attorneys that Juror 27 disclosed that she had a prior felony criminal conviction and her civil rights had not been restored. Because Juror 27 had a prior felony conviction and her civil rights hand not been restored, the trial court concluded that the juror was not qualified to sit on the jury and excused the juror.

I. TRIAL TESTIMONY

A. OFFICER LOUGHEED

Officer Lougheed is a police officer with the City of Aberdeen Police Department. Officer Lougheed was on patrol on February 4, 2016. Officer Lougheed first contacted Steiner at the Grays Harbor Inn & Suites when the manager called and asked to have Steiner removed for smoking in his room. Officer Lougheed spoke with Steiner and then arranged to have a cab pick him up.

Approximately, an hour and a half later, Officer Lougheed contacted Steiner in the Dairy Queen parking lot because the cab driver had called and stated that Steiner would not get out of the car. Steiner advised Officer Lougheed that he had an appointment at SeaMar Clinic. The cab driver agreed to drive Steiner to SeaMar and Officer Lougheed followed them in her patrol car. Officer Lougheed accompanied him into SeaMar. Steiner's appointment was actually for the next day so Officer Lougheed offered to drive Steiner to a nearby motel. Officer Lougheed testified that she took Steiner to several motels, but Steiner refused to stay in all of them. At the last motel, Steiner told Officer Lougheed that he refused to stay there because there was a demon present. Finally, Officer Lougheed returned to SeaMar and dropped Steiner off at a nearby bus stop.

Officer Lougheed stayed nearby and observed Steiner. While she waited, Officer Lougheed tried to confirm an out-of-county warrant for Steiner. Steiner began yelling at a group of men working on a car in a nearby garage. Officer Lougheed decided to contact Steiner again to attempt to calm down the situation. Initially, Officer Lougheed contacted Steiner through the passenger side window of her car and informed him that he needed to calm down. Steiner continued to behave aggressively and at one point offered to sell Officer Lougheed drugs. Because Steiner was escalating, Officer Lougheed got out of the car to contact Steiner directly.

Steiner would not calm down so Officer Lougheed made the decision to arrest him for disorderly conduct. Steiner told Officer Lougheed, "[She] couldn't arrest him if [she] tried." I VRP at 144. Officer Lougheed informed Steiner that he was under arrest for disorderly conduct and told him to place his hands behind his back. Steiner refused to comply and Officer Lougheed took Steiner's arm to execute the arrest. Steiner "yanked his arm away" and hit Officer Lougheed in the chest. I VRP at 145. Officer Lougheed removed her stun gun[2] from its holster but continued trying to get Steiner to comply without deploying the stun gun.

When Steiner continued to pull away from Officer Lougheed, she deployed her stun gun. Only one probe made contact with Steiner and he was able to continue to resist. Then Officer Lougheed attempted to contact the stun gun directly to Steiner's stomach area. Steiner grabbed the stun gun and pulled it out of Officer Lougheed's hands. Then Steiner reached over and touched the stun gun to Officer Lougheed's arm. Officer Lougheed testified that it was a very painful,

[2] A stun gun is an electrical device that is designed to disrupt muscular activity. The stun gun fires two probes that complete a circuit when they come in contact with a person. The stun gun can also be placed in direct contract with a person.

"hard, electric shock." I VRP at 157. Officer Lougheed grabbed the stun gun back and placed it on Steiner's thigh. Steiner fell to the ground but continued trying to resist. Officer Lougheed deployed the stun gun again. Steiner was no longer able to resist and he was placed under arrest.

Officer Lougheed identified Exhibits 3, 4, and 5 as pictures of the stun gun she was carrying during the incident with Steiner. Officer Lougheed testified that the photos were true and accurate representations of her stun gun. Exhibit 5 showed the stun gun with a red substance that Officer Lougheed assumed was blood. Officer Lougheed was not bleeding during or after the incident with Steiner. Officer Lougheed also identified Exhibit 6 as the February 4 stun gun report for the stun gun identified in the pictures. The report showed that the stun gun had been deployed five times. The first entry displayed an invalid date and time. The remaining four entries show February 4 from 11:10:26-11:10:50—a time period of 24 seconds. Each deployment was for 5 seconds except for the last entry which was for 6 seconds.

Officer Lougheed also testified that her patrol vehicle is equipped with a recording system. Officer Lougheed activated the recording system when she contacted Steiner the third time near the bus stop. The State introduced Exhibit 1 which Officer Lougheed testified was a true and accurate depiction. Officer Lougheed testified that there was no visual depiction of the incident because the camera faces forward and Steiner was never in front of the car. Officer Lougheed also testified that the video did not appear to be altered or tampered with in any way.

B. OFFICER DAVID TARRENCE

Officer David Tarrence of the City of Aberdeen Police Department also responded to the Grays Harbor Inn & Suites hotel the morning of February 4. Officer Tarrence testified that Steiner requested a cab to take him from the hotel. When Officer Lougheed also responded to the hotel,

Officer Tarrence left the hotel. Officer Tarrence testified that he left the hotel before the cab arrived to pick up Steiner.

Several hours later, Officer Tarrence contacted Steiner again. Officer Tarrence testified that he responded to the parking lot near SeaMar in response to Officer Lougheed's request for assistance. When Officer Tarrence arrived, Steiner was already handcuffed and placed in a patrol car.

C. WITNESSES

On the morning of February 4, Hector Gonzalez was working on a car with his friends. They were working in a garage across the street from the parking lot near SeaMar. Gonzalez testified that he saw Officer Lougheed contact Steiner and tell him that he was under arrest. He also saw Officer Lougheed attempt to fire her stun gun at Steiner and then take him to the ground when he continued resisting.

Weston Harner was also working on the car with Gonzalez. Harner testified that he saw Steiner "screaming and cussing" in the parking lot. I VRP at 204. He also saw Officer Lougheed attempt to fire her stun gun at Steiner. Then he saw Officer Lougheed struggle with Steiner until additional officers arrived. Harner also testified that he took a cell phone video of the incident. Harner testified that he attempted to give the video to the police but his phone broke.

Noah Walters was also at the garage. When Walters first observed Steiner in the parking lot, Steiner was walking around the parking lot yelling. Walters saw Officer Lougheed attempt to grab Steiner's arm. Walters also saw Steiner pull his arm away and hit Officer Lougheed in the chest. He saw Officer Lougheed attempt to fire her stun gun. Then he saw Officer Lougheed use

the stun gun directly on Steiner's chest area. Then Officer Lougheed kept Steiner on the ground until other officers arrived.

Christian Walters was the last of the people working on the car in the garage. He testified that he originally heard Steiner yelling in the parking lot. Then he saw Officer Lougheed arrive and get out of the car to confront Steiner. Then he saw Officer Lougheed attempt to arrest Steiner. Ultimately, Officer Lougheed used her stun gun and arrested Steiner.

D. DAVID HALLER

David Haller was the private investigator assigned to investigate Steiner's case. Haller testified that he met with Steiner and obtained a list of the evidence Steiner wanted checked. First, Haller went to SeaMar to see if they had any video cameras. Haller verified that SeaMar did not have any video cameras.

Haller also called the Yellow Cab Company. Haller testified that the Yellow Cab Company verified that law enforcement called them and asked them to respond to a motel. The Yellow Cab Company also confirmed that Steiner's name was on their log. Haller could have obtained documentary evidence from the Yellow Cab Company but he "didn't make it by to pick that up." II VRP at 237.

Haller checked the availability of videos from the Dairy Queen as well. The Dairy Queen had three video cameras. However, the Dairy Queen video had been recorded over.

Haller also identified Exhibits 7-17 as pictures that he took of the area around the parking lot near SeaMar. Haller testified that he believed he had performed a thorough investigation.

E. STEINER

Steiner testified in his own defense. Steiner testified that on February 4, he was staying in a motel. He testified that the person at the front desk, Mr. Kent, called the police to escort him out because Kent smelled smoke in the room. Steiner testified that the officers did not call a cab for him. Instead, he testified that he left the Grays Harbor Inn & Suites with Officer Lougheed.

When his attorney asked where he went with Officer Lougheed, Steiner asked for a chalkboard so he could draw a diagram for the jury. He testified that he did go to one motel with Officer Lougheed but he decided he could not afford to stay in a motel. Instead, Steiner asked Officer Lougheed to drop him off at the bus stop.

Steiner testified that when they pulled into the parking lot near SeaMar, he only saw three people working on the car in the garage. Steiner testified that the three people looked scared. Steiner exited Officer Lougheed's patrol car and walked to the back of the car to get his belongings out of the truck. Steiner testified that Officer Lougheed was beginning to look upset. Steiner backed away from the car. Then Steiner testified that Officer Lougheed got out of the vehicle wearing a "bombardier jacket." II VRP at 262. Steiner claimed that Officer Lougheed got out of the car and told him he had two misdemeanor warrants and a felony warrant.

Steiner testified that Officer Lougheed started approaching him. Steiner attempted to stand up and demonstrate how Officer Lougheed was approaching him. However, the trial court told Steiner to sit down. Steiner said he was standing with his hands up in plain view, but Officer Lougheed advanced on him and drew her stun gun when she was right in his face. Steiner stated that he did not fight with Officer Lougheed. He also claimed that he did not take the stun gun from

her and he did not use the stun gun against her. Again, the trial court had to repeatedly tell Steiner to remain seated.

Steiner repeatedly asked to view the dash cam video again. When Steiner's attorney finally played the video, Steiner insisted that the times on the video were wrong. When Steiner was asked if it was his voice on the video, he insisted that the video be played again. The trial court permitted the video to be played again. Steiner denied making any of the statements heard on the video. Steiner alleged that the video had been tampered with. He also testified that other videos of the incident had been destroyed.

Steiner testified that after the incident he had a lot of injuries on his hands. He tried to get the jail to take pictures of his injuries but they refused.

II. CLOSING ARGUMENTS

The State's closing argument emphasized that the case came down to a credibility determination—whether the jury believed Officer Lougheed or Steiner. The State argued that Steiner assaulted Officer Lougheed when he hit her as she tried to arrest him. The State argued that Steiner disarmed Officer Lougheed when he grabbed her Taser. When addressing Steiner's credibility, the State argued,

> The defendant said, oh, well, that guy just came into my room and said there was smoke and kicked me out. They didn't call me a taxi. They took me in the police car. And the next thing I know I'm getting arrested and I had my hands up. And she was wearing a bombardier jacket. And there were only three kids working on the car in that garage. And they didn't take photos of my injuries. All things that we know aren't true.
>
> Oh, and he didn't say those things that are on the video, too. Remember, that video is tampered with. Really? It seems like if somebody were going to gin up some evidence to convict the defendant, we could have done a much better job like, you know, had the camera actually facing him or actually recorded more than a couple of fleeting statements. No, folks, I'm sure I could have found somebody

> from the Aberdeen Police Department come in, somebody who worries about dash cam videos all day long to come in and explain to you that I—you know, the police wouldn't even know how to manufacture this evidence or—but, I mean, is it really—is it really under contention?

II VRP at 316-17. The State also briefly addressed Steiner's behavior 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 is 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 disorders, like antisocial 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.

II VRP at 320-21.

III. VERDICTS AND SENTENCING

The jury found Steiner guilty of assault in the third degree. By special verdict form, the jury found that Steiner did not assault Officer Lougheed with a projectile stun gun. The jury also found Steiner guilty of disarming a law enforcement officer.

Steiner had an extensive criminal history, although the majority of the offenses were misdemeanors that did not count towards Steiner's offender score. Among the convictions the State intended to include in Steiner's offender score calculation was a 2016 attempted second degree assault from Colorado. In Colorado, Steiner pleaded guilty to criminal attempt to commit assault in the second degree charged 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.

Sentencing, Ex. 1. The State argued that attempted assault in Colorado is comparable to an actual assault in Washington because Colorado assault is the equivalent of only common law battery while Washington assault includes both common law assault and common law battery. Therefore, the attempted second degree assault statute as charged in Colorado was the equivalent of custodial assault in Washington.

At his sentencing hearing, Steiner was given the opportunity to address the court. Steiner began talking about the art in the courthouse and the biblical significance of the art. The trial court interrupted Steiner and noted that Steiner was reading from pieces of paper. Steiner informed the court that it was only two pages and the trial court allowed him to continue. Steiner continued his statement incorporating references to Jesus, Pontius Pilate, and evil. When Steiner had finished the second page, the trial court interrupted again. The trial court gave Steiner another 10 seconds. Steiner used his remaining 10 seconds to discuss the crucifixion. The trial court did not allow Steiner to speak any longer.

The trial court agreed with the State's offender score calculation, which included Steiner's Colorado attempted assault conviction. Steiner's offender score was calculated as 6 on each count. The trial court imposed a standard range sentence and imposed mandatory legal financial obligations. Steiner appeals.

ANALYSIS

Steiner challenges his convictions by arguing that the trial court erred by abusing its discretion in entering the original competency order and by failing to sua sponte order a second

competency hearing. Steiner also challenges his sentence arguing that he received ineffective assistance counsel when his attorney failed to argue that his offenses were the same criminal conduct. And Steiner challenges his sentence arguing that the trial court erred by including his Colorado conviction in his offender score.

Here, the trial court did not abuse its discretion in finding Steiner competent to stand trial. And because Steiner's behavior was the same before the first competency hearing as it was after it, the trial court did not err by failing to order a second competency hearing. Counsel's performance was not deficient for failing to argue same criminal conduct and Steiner was not prejudiced. Therefore, Steiner did not receive ineffective assistance of counsel. Finally, Steiner's Colorado conviction for attempted assault is comparable to Washington's custodial assault statute and, therefore, the trial court did not err by including Steiner's Colorado conviction in Steiner's offender score.

I. COMPETENCY

A. COMPETENCY FINDING

Steiner argues that the trial court erred by failing to hold a formal evidentiary hearing at the time that it entered the competency order. When the party who initially challenges the defendant's competency agrees that the defendant is competent, the trial court does not abuse its discretion by finding that the defendant is competent, even without a formal evidentiary hearing.

"No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. A defendant is competent to stand trial if he has the capacity to understand the nature of the proceedings against him and if he can assist in his own defense. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985); *see also*

RCW 10.77.010(15). The party challenging the defendant's competency bears the burden of proving the defendant is incompetent to stand trial. *State v. Coley*, 180 Wn.2d 543, 554, 326 P.3d 702 (2014).

We defer to the trial court's determination of a defendant's mental competency. *Coley*, 180 Wn.2d at 551. We will not reverse a trial court's determination of competency absent an abuse of discretion. *Coley*, 180 Wn.2d at 551. A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds or reasons. *State v. Lewis*, 141 Wn. App. 367, 386, 166 P.3d 786 (2007).

Here, Steiner's attorney moved for a competency evaluation hearing. Therefore, Steiner had the burden to show that he was incompetent to stand trial. After the competency evaluation was completed, both Steiner and the State agreed that Steiner was competent to stand trial. By agreeing that he was competent to stand trial, Steiner did not meet his burden to show that he was incompetent. Therefore, the trial court did not abuse its discretion by finding that Steiner was competent to stand trial.

B. SECOND COMPETENCY HEARING

Steiner also argues that the trial court erred by failing to order a second competency hearing as the trial progressed. Because Steiner's behavior was the same both before and after the trial court's competency order, the trial court did not abuse its discretion by failing to sua sponte order a second competency hearing.

Whenever there is a reason to doubt the defendant's competency, the trial court, either on its own motion or the motion of any party, is required to order a qualified expert to evaluate and report on the defendant's mental condition. RCW 10.77.060(1)(a). "[A] hearing is required only

if the court makes a threshold determination that there is reason to doubt the defendant's competency." *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). The determination of whether to order a competency hearing is within the trial court's discretion. *Lord*, 117 Wn.2d at 901.

Steiner argues that the trial court should have ordered a second competency hearing because Steiner's behavior at trial demonstrated his "obsession with videos of the incident" and denial of essentially uncontested facts.[3] Br. of Appellant at 36. However, Steiner exhibited this same behavior prior to the initial competency hearing. In fact, these are exactly the concerns that caused Steiner's attorney to request the initial competency hearing. Because, after the initial competency evaluation, the parties agreed that Steiner was competent despite this behavior, the trial court did not have reason to doubt the defendant's competence based on the same behavior. Therefore, the trial court did not abuse its discretion by failing to sua sponte order a second competency evaluation.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Steiner argues that he received ineffective assistance of counsel because his counsel failed to argue that his convictions should be counted as the same criminal conduct. To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of

[3] Steiner also references his behavior during sentencing during which he read a statement that was primarily related to themes of religion and evil. However, the trial court was obviously not aware of this behavior during trial and therefore, it cannot be a basis for holding that the trial court abused its discretion by failing to order a second competency hearing during the trial.

reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Our scrutiny of counsel's performance is highly deferential; there is a strong presumption of reasonableness. *McFarland*, 127 Wn.2d at 335. To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *McFarland*, 127 Wn.2d at 335. If the defendant fails to establish either deficient performance or prejudice, the ineffective assistance of counsel claim fails. *Strickland*, 466 U.S. at 697.

RCW 9.94A.589(1)(a) states that, if the trial court finds that two or more offenses are the same criminal conduct, then those offenses shall be counted as one crime. "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

Steiner's argument regarding same criminal conduct appears to base the same criminal conduct on the assumption that the assault occurred when Steiner allegedly used Officer Lougheed's Taser against her. However, by special verdict, the jury found that Steiner did not assault Officer Lougheed with the Taser. Therefore, the jury's guilty verdict on the assault must have been based on Steiner's shoving Officer Lougheed during her initial attempt to arrest Steiner. Because Steiner performed two distinct acts with two different intents, he cannot show that the trial court would have counted his convictions as the same criminal conduct. Therefore, Steiner cannot meet his burden to show deficient performance or prejudice and his ineffective assistance of counsel claim fails.

III. COMPARABILITY

Steiner argues that the trial court incorrectly included his Colorado conviction in his offender score because the Colorado conviction for attempted assault in the second degree is only

comparable to attempted custodial assault, which is a gross misdemeanor in Washington. The trial court properly included Steiner's Colorado conviction in Steiner's offender score calculation because it is factually comparable to a Washington conviction for custodial assault.

We review the trial court's calculation of a defendant's offender score de novo. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State bears the burden to prove by a preponderance of the evidence the existence and comparability of a defendant's prior out-of-state convictions. *State v. Collins*, 144 Wn. App. 547, 554, 182 P.3d 1016 (2008).

To determine comparability of offenses, the court must first determine if the crimes are legally comparable. *Olsen*, 180 Wn.2d at 472. The court determines legal comparability by comparing the elements of the out-of-state conviction to the elements of the relevant Washington offense. *Olsen*, 180 Wn.2d at 472-73. If the out-of-state statute is identical to or narrower than the Washington statute, then the out-of-state conviction counts towards the defendant's offender score as if it were the Washington offense. *Olsen*, 180 Wn.2d at 472-73.

However, if the out-of-state statute is broader than the Washington statute, then the court determines factual comparability. *Olsen*, 180 Wn.2d at 473. To determine factual comparability, the court looks at whether the defendant's conduct in the out-of-state conviction would have violated the comparable Washington statute. *Olsen*, 180 Wn.2d at 473. In determining factual comparability, the trial court may "consider only facts that were admitted, stipulated to, or proved beyond a reasonable doubt." *Olsen*, 180 Wn.2d at 473-74.

Steiner argues that the Colorado assault in the second degree statute is not legally comparable to a Washington felony. Here, the relevant Washington statute is Washington's custodial assault statute, RCW 9A.36.100. Therefore, the appropriate legal comparability analysis is whether Steiner's Colorado conviction is legally comparable to Washington's custodial assault statute.

Steiner was charged with and pleaded guilty to attempted assault in the second degree in Colorado. The relevant portion of the Colorado assault in the second degree statute reads,

> (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.

Former CO Rev. Stat. § 18-3-203 (2014).

In Washington, RCW 9A.36.100 defines custodial assault as,

> (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.

Under these statutes, the elements of a Colorado assault and the elements of a Washington custodial assault are legally comparable because a violation of the Colorado statute necessarily violates the Washington statute.

However, because Steiner was convicted of attempted assault in the second degree in Colorado, we must also examine the comparability of the Colorado attempt statute. In Colorado, "criminal attempt" is defined as "acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense." CO Rev. Stet. § 18-2-101(1) (2014). Similarly, in Washington, a person is guilty of criminal attempt "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." RCW 9A.28.020(1). In addition, the definition of assault in Washington encompasses attempted battery:

> Three definitions of assault are recognized in Washington: (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); (3) putting another in apprehension of harm.

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

Here, an attempted assault in the second degree in Colorado could be either an attempted battery, which would be considered a custodial assault, or an attempted assault, which would be considered an attempted custodial assault. In this situation, custodial assault is a Class C felony, but attempted custodial assault is a gross misdemeanor in Washington. RCW 9A.36.100; RCW 9A.28.020. Therefore, a Colorado conviction for attempted assault in the second degree is not legally comparable to a Washington felony. Therefore, we must examine the factual comparability of the offense as charged to determine whether Steiner's Colorado conviction was properly included in Steiner's offender score.

Here, both parties agree that Steiner committed the Colorado attempted second degree assault by spitting at a detention officer. Spitting at a detention officer, but failing to hit the officer

with the saliva or mucus, is an attempted battery. Because Washington recognizes attempted battery as a form of assault, Steiner's actions constitute a custodial assault. Therefore, the Colorado conviction is considered factually comparable to a custodial assault in Washington.

Because Steiner's Colorado conviction is factually comparable to a Washington conviction for custodial assault, and custodial assault is a Class C felony, the trial court properly included Steiner's Colorado conviction in his offender score. Accordingly, Steiner's offender score was not miscalculated. We affirm.

SAG CLAIMS

I. DID THE TRIAL COURT VIOLATE CRR 3.3 TIME FOR TRIAL RULES?

Steiner claims that the trial court violated his time for trial rights by granting three motions to continue his trial.[4] In this case, there was only one motion to continue the trial—the motion to continue made by the State on June 20, 2016 due to Officer Lougheed's pre-scheduled vacation. The other two times that time for trial was at issue were the stay of the time for trial period during Steiner's competency evaluation beginning April 25 and the resetting of the time for trial period after Steiner's attorney withdrew from the case on May 9. None of these three instances violated the CrR 3.3 time for trial rules.

[4] Steiner references "speedy trial" in his SAG. SAG at 21. He does not differentiate between time for trial claims under CrR 3.3 and constitutional speedy trial claims. *See State v. Smith*, 67 Wn. App. 847, 853 n. 2, 841 P.2d 65 (1992). Because we will not resolve a claim on constitutional grounds if other grounds are available, Steiner's claims are addressed as alleged violations of the CrR 3.3 time for trial rule. *State v. Bassett*, 198 Wn. App. 714, 722 n. 8, 394 P.3d 430, *review granted*, 189 Wn.2d 1008 (2017) (citing *State v. McEnroe*, 179 Wn.2d 32, 35, 309 P.3d 428 (2013)).

Under CrR 3.3(b)(1), a defendant detained in jail must be brought to trial within 60 days. However, several provisions of CrR 3.3 can modify this general rule. CrR 3.3(e) defines periods that are excluded from calculating the time for trial period, including all proceedings related to the competency of the defendant to stand trial. And the commencement date for the time for trial period is reset when a defendant's attorney is disqualified from representing the defendant. CrR 3.3(c)(vii). Finally, the trial court has the discretion to grant motions to continue "when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2).

Here, the period from April 25 to May 9 is an excluded period for the purposes of CrR 3.3(e) because it was the period during which Steiner was undergoing competency evaluations. And, on May 9, the trial court did not err by resetting Steiner's time for trial commencement date because his attorney was disqualified by being permitted to withdraw. Finally, the trial court properly granted the State's motion to continue on June 20 because Officer Lougheed was on a previously scheduled vacation and she was the State's primary witness. The administration of justice requires the State to be able to present their case, while there is nothing in the record that supports a contention that Steiner's presentation of his defense was prejudiced by the continuance.

The trial court complied with the CrR 3.3 time for trial requirements, therefore, Steiner's time for trial rights were not violated and his SAG claim fails.

II. Did the Trial Court Err by Granting Steiner's Attorney's Motion for a Competency Evaluation?

Steiner claims that the trial court erred by granting his attorney's motion for a competency evaluation. Steiner claims that his attorney tricked him by asking for the evaluation and that he

should not have been given the evaluation because he had already been in jail for a long time on false charges. And he asserts that his defense attorney had never mentioned the possibility of an evaluation until immediately before trial.

RCW 10.77.060 states that the trial court "shall" order a competency evaluation on the motion of any party when there is reason to doubt the defendant's competency. Here, Steiner was exhibiting erratic behavior such as fixating on video evidence and allegations of fabrications. He was also sending letters to the trial court on a regular basis. Steiner's attorney was in the best position to determine whether there was a concern about Steiner's ability to assist in his own defense and once Steiner's attorney made the motion the trial court was required to order an evaluation. Although the evaluation ultimately determined that Steiner was competent, there was no error in Steiner's attorney requesting the evaluation or in the trial court ordering the evaluation.

III. DID THE PROSECUTOR COMMIT MISCONDUCT?

Steiner alleges that the prosecutor "told the jury that [he] was way out of it" and "made [him] to look like some kind of monster that is scared of demons." SAG at 11, 14. The prosecutor did not tell the jury that Steiner was out of it; however, in closing argument, the prosecutor did tell the jury that it should not consider any of Steiner's behavior that indicated the existence of mental illness. And, the only reference to demons was a single question about why Steiner refused to stay in a particular motel. Steiner did not object to either of these instances at trial.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). If a defendant does not object at trial, he or she is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction

could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show that no curative instruction could have cured any prejudice and the resulting prejudice had a substantial likelihood of affecting the jury verdict. *Emery*, 174 Wn.2d at 761. In making a prejudice determination, we focus more on whether the resulting prejudice could have been cured. *Emery*, 174 Wn.2d at 762.

Here, even if we assume that the prosecutor's conduct was improper, any prejudice could easily have been cured by an objection and a curative instruction. Officer Lougheed's statement that Steiner did not want to stay at a particular hotel because of a demon was an isolated comment that occurred the first day of trial. An objection and an instruction to strike the answer would have easily cured any prejudice. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009) (we presume that juries follow the trial court's instructions.). Similarly, the prosecutor's brief statement during closing argument occurred two days later and could have also been cured by an objection and a curative instruction to strike. Therefore, Steiner has failed to meet his burden to prove prosecutorial misconduct.

IV. Did Steiner Receive Ineffective Assistance of Counsel?

Steiner alleges that he received ineffective assistance of counsel because (1) his attorneys did not listen when he asked them to hurry so the State could not fabricate evidence and (2) his attorneys acted like they did not have time to meaningfully assist him. As noted above, to prevail on an ineffective assistance claim, Steiner must show both deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687. There is a strong presumption that defense counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335.

Here, Steiner's allegations that his attorneys were slow and acted like they did not have time are not sufficient to overcome the strong presumption of reasonableness. Without more information, this court presumes that Steiner's attorneys acted reasonably and dedicated an adequate amount of time to Steiner's case. Therefore, Steiner has failed to show his attorneys' performances were deficient and his ineffective assistance of counsel claim fails.

V. WAS JUROR 27 IMPROPERLY INCLUDED IN THE JURY VENIRE?

Steiner also alleges that Juror 27 was improperly included in the jury venire. Although Steiner alleges Juror 27 seemed like she would make a good juror, he cannot show how her inadvertent inclusion in the jury venire was an error that requires reversal.

By statute, a person is not competent to serve on a jury if he or she "[h]as been convicted of a felony and has not had his or her civil rights restored." RCW 2.36.070(5). Regardless of whether Juror 27 was improperly included in the jury venire, she was incompetent to serve on the jury due to her prior felony conviction and because her civil rights had not been restored. Thus, the trial court properly dismissed her. Any error that was committed by including Juror 27 in the jury venire was cured when the trial court dismissed her.

VI. DID THE TRIAL COURT IMPROPERLY LIMIT STEINER'S TRIAL TESTIMONY AND SENTENCING ALLOCUTION?

Steiner claims that the trial court improperly limited his ability to testify and speak at his allocution. Criminal defendants have a constitutional right to testify on their own behalf. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). However, the trial court did not prevent Steiner from testifying. The only way in which the trial court interfered with Steiner's testimony was when the trial court repeatedly told Steiner that he had to stay seated while testifying. There

is nothing improper about the trial court requiring the defendant to stay seated while testifying. *State v. DeWeese*, 117 Wn.2d 369, 380, 816 P.2d 1 (1991) (A trial court has the right to maintain order and decorum in its courtroom.).

Criminal defendants also have a statutory right to allocution. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 333-34, 6 P.3d 573 (2000). The right to allocution is codified in RCW 9.94A.500 which requires the trial court to allow arguments from the defendant as to the sentence to be imposed. Here, the trial court did not deny Steiner his right to allocution. The trial court allowed Steiner to make a statement to the court; however, Steiner's statement was not related to the sentence to be imposed—it was entirely related to religious themes. The trial court simply refused to allow Steiner to continue speaking about information not related to the sentence to be imposed.

VII. WAS STEINER DENIED THE EFFECTIVE ASSISTANCE OF A PRIVATE INVESTIGATOR?

Steiner also claims that the private investigator assigned to his case was ineffective for failing to take additional pictures and obtain the videos requested by Steiner. Even if we assume that a defendant has a right to an effective investigator, a proposition that is unsupported by authority, Steiner has not shown that Haller's performance was ineffective.

Haller testified at trial that he followed up on all the video that Steiner asked for. And Haller testified that he took numerous photographs of the area where the altercation with Officer Lougheed occurred. Steiner may have been unsatisfied with the results of Haller's investigation, but Haller performed all the investigatory tasks Steiner requested. Accordingly, there is no merit to Steiner's complaints regarding Haller.

VIII. SHOULD STEINER'S CONVICTIONS BE REVERSED BECAUSE THERE WAS GOVERNMENT MISCONDUCT RELATED TO THE UNAVAILABILITY OF HARNER'S CELL PHONE VIDEO OF THE ASSAULT?

Steiner also expresses frustration with the fact that the video from Harner's cell phone was never provided to the State. However, here the cell phone video was not provided to the State because, before Harner did so, his phone was broken. There was no government misconduct, nor was there any fault in the loss of the video. Therefore, there are no grounds for reversing Steiner's convictions based on the State's failure to obtain Harner's cell phone video.

IX. WAS STEINER DENIED HIS RIGHT TO PRESENT WITNESSES IN HIS OWN DEFENSE?

Steiner repeatedly claims that he was not able to present witnesses in his own defense. Steiner primarily focuses on the testimony of someone he names Mr. Sing. However, there is no Mr. Sing mentioned anywhere in the transcripts of Steiner's case. And he provides no other information about the other 9-10 witnesses he claims he was prevented from calling. We will not consider information outside the record on appeal. *McFarland*, 127 Wn.2d at 335. Because there is no information in the record, or even in Steiner's SAG claim about the witnesses Steiner wanted to call in his defense, Steiner has not demonstrated reversible error based on his inability to call witnesses.

X. WAS STEINER DENIED HIS RIGHT TO PRESENT A DEFENSE BECAUSE HE WAS UNABLE TO OBTAIN ADDITIONAL VIDEOS AND OTHER EVIDENCE?

Steiner argues that he should have been able to present evidence from various video sources. However, Steiner has not made any showing how the videos would be relevant to presenting his defense. None of the evidence that Steiner claims he was unable to present was directly related to the altercation with Officer Lougheed. The Dairy Queen video would have, at

best, only shown whether Officer Lougheed picked Steiner up earlier in the day. And Haller testified that SeaMar did not have any video cameras so there were no additional videos of the area where the altercation took place.

And Steiner also asked for video and clothes from the jail but these are equally irrelevant. It appears that Steiner wanted the video and clothes from the jail to demonstrate that he was injured by Officer Lougheed, but Officer Lougheed never denied that there was an altercation or that she used her stun gun against Steiner on several occasions during the altercation. Steiner has not made any argument as to how this evidence would have aided his defense.

Because Steiner has not shown that any of the evidence he sought would have been relevant to his defense, there was no error related to his inability to obtain this additional evidence.

XI. WAS STEINER DENIED THE RIGHT TO PRESENT A DEFENSE BECAUSE HE WAS UNABLE TO PRESENT EVIDENCE THAT THE TAXI COMPANY HAD NO RECORD OF HIM RIDING IN A TAXI?

Steiner also claims that he should have been permitted to present evidence that the cab company had sent him a letter confirming that they did not have a record of providing a cab for him. Steiner attached a copy of the letter to his SAG; however, the letter is not a part of the record on appeal. We will not consider evidence outside the record on direct appeal. *McFarland*, 127 Wn.2d at 335. Accordingly, we do not consider Steiner's arguments regarding the evidence that the cab company never provided him with a cab.

XII. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT?

Steiner claims that there was insufficient evidence to support the jury's verdict because the officer's dash cam video had been fabricated. However, Officer Lougheed testified that the video was accurate and had not been fabricated. We do not review credibility determinations on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, we do not review Steiner's repeated allegations of fabrication on appeal because they have already been considered and rejected by the jury.

XIII. SHOULD THIS COURT DECLINE TO ADDRESS ISSUES THAT REQUIRE REVIEWING CREDIBILITY DETERMINATIONS ALREADY MADE BY THE JURY?

Steiner also makes additional claims that are contrary to the credibility determinations already made by the jury. Because we do not review credibility determinations on appeal, Steiner's claims that rest on his version of events already rejected by the jury must fail. *Camarillo*, 115 Wn.2d at 71.

XIV. SHOULD THIS COURT DECLINE TO ADDRESS ISSUES THAT RELY ON FACTS OUTSIDE THE RECORD ON DIRECT APPEAL?

Steiner also makes numerous references to evidence outside the record on appeal. We do not review claims that rest on evidence outside the record on direct appeal. *McFarland*, 127 Wn.2d at 335. Therefore, any claims Steiner makes based on references to evidence outside the record on appeal must fail.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Johanson, J.
JOHANSON, P.J.

Bjorgen, J.
BJORGEN, J.

THE TILLER LAW FIRM

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