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COURT OF APPEALS
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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

TITUS DION PETERSON,

Defendant/Appellant.

BRIEF OF APPELLANT

Pierce County Superior Court

Cause No.03-1-03896-4

**The Honorable Thomas P. Larkin,
Presiding at the Trial Court**

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I. ASSIGNMENTS OF ERROR

1. Mr. Peterson's right to be free from double jeopardy was violated.
2. The trial court exceed its statutory authority.
3. The trial court erred in calculating Mr. Peterson's offender score.
4. Mr. Peterson did not receive ineffective assistance of counsel.
5. There was insufficient evidence to convict Mr. Peterson of assault in the third degree.

II. ISSUES PRESENTED

1. Where Mr. Peterson had been charged in the information with committing a crime while on community custody, the State had failed to introduce any evidence at trial regarding whether or not Mr. Peterson was on community custody at the time of the crime, and the jury had rendered its verdict without being instructed on or given a special verdict form regarding whether or not Mr. Peterson was on community custody, was it error and did it violate Mr. Peterson's right to be free from double jeopardy for the trial court to allow introduction of new evidence and hold a "special hearing" to determine whether or not Mr. Peterson was on community custody at the time these crimes were committed? (Assignments of Error Nos. 1 & 2)
2. Was Mr. Peterson's offender score properly calculated where the trial court based his offender score on his out of state convictions but failed to engage in the required comparability analysis on the record? (Assignment of Error No. 3)
3. Did Mr. Peterson receive effective assistance of counsel where his trial counsel failed to move the court to consider the charges of assault in the third degree and attempt to elude the

police officer as the same criminal conduct for purposes of sentencing? (Assignment of Error No. 4)

4. Did the State produce sufficient evidence to convict Mr. Peterson of assault in the third degree where the State did not introduce any evidence that Mr. Peterson's intent in backing towards the police car was to assault the officers rather than to elude the officers? (Assignment of Error No. 5)

III. STATEMENT OF THE CASE

A. Procedural Background

On February 21, 2006, Mr. Peterson was charged by amended information with one count of assault in the third degree while on community custody at the time of commission of the crime, one count of taking a motor vehicle without permission in the second degree with the aggravating factor that Mr. Peterson was on community custody at the time of commission of the crime, one count of attempting to elude a pursuing police vehicle with the aggravating factor that Mr. Peterson was on community custody at the time of commission of the crime, one count of obstructing a law enforcement officer, one count of making a false or misleading statement to a public servant, one count of unlawful possession of a controlled substance – forty grams or less of marijuana, one count of no valid operator's license, and one count of tampering with a witness. CP 20-23. Later that day the prosecutor moved to dismiss the charge of making a false or misleading statement to a

public servant and the court dismissed the charge. RP 35-36.

On February 22, 2006, a jury was sworn and a jury trial commenced. RP 51.

On February 27, 2006, the State voluntarily moved to dismiss the counts of taking a motor vehicle without permission and tampering with a witness. RP 226-227.

On February 28, 2006, testimony and argument finished and the case was given to the jury for deliberation. RP 384. The jury received no instructions regarding community custody and was not given a special verdict form regarding community custody. CP 29-54.

On March 1, 2006, the jury returned verdicts of guilty on the counts of assault in the third degree, attempting to elude a pursuing police vehicle, obstructing a law enforcement officer, unlawful possession of a controlled substance, and no valid operator's license. CP 64-67, RP 392-398.

After entry of the verdict but prior to the release of the jury, the court was informed by the clerk that there was "another phase to this trial." RP 398. The trial court reconvened the jury for a "special hearing" regarding whether or not Mr. Peterson was on community custody at the time the crimes were committed. RP 411.

Additional testimony and argument was heard by the jury (RP 411-

427) following which the jury retired a second time to deliberate. RP 428. The jury returned the same day with special verdicts that Mr. Peterson was on community custody at the time he committed the crimes of assault in the third degree and attempting to elude a pursuing police vehicle. CP 68-69, RP 428-432.

On March 27, 2006, Mr. Peterson was sentenced with an offender score calculated to be over nine points, including points for convictions from Maryland. CP 74-85. The trial court did not engage in a comparability analysis between the Maryland statutes and the applicable Washington statutes at the time of sentencing.

Notice of appeal was timely filed April 24, 2006. CP 88.

B. Factual Background

In the early morning of August 21, 2003, police officer Russell Martin observed a vehicle being driving without the headlights on. RP 83-89. Officer Martin was patrolling with Deputy Jesse Petersen. RP 85. Deputy Petersen was driving the police cruiser. RP 87. After the vehicle driving without headlights passed the police cruiser, Deputy Petersen turned the cruiser around and drove behind the other vehicle to initiate a stop. RP 88-89. Deputy Petersen activated the overhead lights and began to follow the vehicle. RP 89.

The vehicle slowed down then began to execute a u-turn and stopped. RP 90. The driver's hand came out of the window the vehicle and motioned at the police cruiser. RP 90. The driver mouthed something at the police. RP 126. Deputy Petersen pulled the police car behind the vehicle to initiate the traffic stop. RP 90-91.

As Deputy Petersen pulled behind the other vehicle, the other vehicle began to back up towards the police car. RP 91-92. Deputy Petersen maneuvered the police car out of the way and the other vehicle drove away. RP 91-92. Deputy Petersen activated the siren and pursued the other vehicle. RP 94. Had Deputy Petersen not moved the police cruiser as the other vehicle was backing up, the other vehicle would have struck the police cruiser on the driver's side, possibly disabling it or injuring Deputy Petersen. RP 92, 127-128. Deputy Petersen identified Mr. Peterson as the driver of the other car. RP 127-128.

Deputy Petersen pursued the other vehicle at speeds of 50 to 70 miles per hour. RP 95, 97. As the other vehicle was pursued, additional police officers assisted in the pursuit. RP 95. Eventually the other vehicle was disabled and stopped. RP 94-101. After the other vehicle was stopped, the driver exited the other vehicle. RP 101.

Deputy Honeycutt is the police officer who ultimately disabled the

vehicle Mr. Peterson was driving. RP 159-160. When Mr. Peterson's vehicle came to a stop, Deputy Honeycutt's vehicle was right next to Mr. Peterson's car. RP 160. Deputy Honeycutt got a good look at the driver, and identified the driver as Mr. Peterson. RP 160-161. After exiting the vehicle, Deputy Honeycutt followed Mr. Peterson and saw Mr. Peterson take off the black jacket he was wearing and jump a fence. RP 161-162. Deputy Honeycutt lost sight of Mr. Peterson after Mr. Peterson jumped over a second fence. RP 163.

Police Officer Wendy Haddow is a K-9 officer with the Tacoma Police Department. RP 174. Officer Haddow assisted in the pursuit of Mr. Peterson's vehicle. RP 175. The driver of the suspect vehicle ran past Officer Haddow and she got a good look at him. RP 178-179. Officer Haddow identified Mr. Peterson as the driver of the other vehicle. RP 179. After Mr. Peterson had exited his vehicle and jumped over the fence, Officer Haddow exited her vehicle with her dog and the dog found a black jacket. RP 176-178. Officer Haddow gave the jacket to Officer Petersen. RP 178, 197. Officer Petersen searched the jacket and found a sandwich baggy containing marijuana. RP 198.

Officer Ryan Lane did not assist in the pursuit of Mr. Peterson's vehicle but did assist in the search of the area for Mr. Paterson. RP 185-187.

Officer Lane located Mr. Peterson underneath a sheet of plywood in the back yard of a home. RP 188-190. When Mr. Peterson was removed from under the sheet of plywood he was breathing heavily and sweating. RP 194.

IV. SUMMARY OF TESTIMONY

Russell Martin: RP 83-116

On the morning of August 21, 2003, Officer Martin was working as a field training officer training Deputy Jesse Petersen. The officers observed a vehicle being driving without its headlights on, so Deputy Petersen turned the police car around, turned on the overhead lights on the police cruiser, and followed the other vehicle. The other vehicle turned a corner then attempted to perform a u-turn, but before the vehicle could complete the u-turn Officer Petersen pulled the police cruiser behind the other vehicle.

The other vehicle began to back towards the police car, so Officer Petersen maneuvered the police car to avoid being hit. The other car drove away. Officer Petersen turned on the siren and pursued the other vehicle. Other police vehicles joined the pursuit. The other vehicle was pursued until the other vehicle was stopped and the driver jumped out of the other vehicle.

Jesse Petersen: RP 117-152

In August of 2003, Officer Petersen was an officer with the Pierce County Sheriff's Department. Officer Petersen saw the other vehicle driving

with only its parking lights on and attempted to stop the vehicle. The other vehicle turned onto another street and attempted to perform a u-turn. Officer Petersen pulled the police car behind the other car and as Officer Petersen was pulling in behind the other vehicle, the driver of the other vehicle was gesturing at the police car and mouthing something to the police. The other car began backing towards the police cruiser. Officer Petersen was able to move the police car so it wasn't hit. Officer Petersen identified Mr. Peterson as the driver of the other car.

Other police cars joined the pursuit and ultimately another police vehicle succeeded in stopping Mr. Peterson's vehicle. Once Mr. Peterson had been taken into custody Officer Petersen transported him to the Pierce County Jail.

Jesse Petersen: RP 197-204 (recalled)

Officer Petersen was given a jacket by Officer Haddow. Officer Petersen searched the jacket and found a baggie containing what he recognized through his training and experience as marijuana. The jacket did not contain a wallet or anything else indicating who the jacket belonged to.

Eric Honeycutt: RP 152-174

Deputy Honeycutt works with the Pierce County Sheriff's Department and assisted in the pursuit of Mr. Peterson's vehicle. Deputy Honeycutt is the

officer who performed the PIT maneuver which ultimately stopped Mr. Peterson's vehicle. Deputy Honeycutt observed Mr. Peterson exit the other vehicle after it came to a stop. Deputy Honeycutt saw the driver of the vehicle remove a black jacket and then jump over a fence.

Eric Honeycutt: RP 309-312 (recalled)

Mr. Peterson is the person Deputy Honeycutt saw running from the vehicle and plaintiff's exhibits 9 and 10 are the booking photographs of Mr. Peterson and depict how Mr. Peterson looked on the night he was arrested.

Mr. Peterson was either pepper sprayed or maced, but Deputy Honeycutt does not know who did it.

Wendy Haddow: RP 174-184

Officer Haddow is a K-9 officer with the Tacoma Police department. She assisted in the pursuit of Mr. Peterson's vehicle and her dog recovered a black jacket from the scene where Mr. Peterson exited his vehicle and jumped a fence. Officer Haddow gave the jacket to Deputy Petersen.

Ryan Lane: RP 184-197

Officer Lane assisted in searching the area for Mr. Peterson after he jumped out of his vehicle. Officer Lane located Mr. Peterson in the back yard of a home underneath a piece of plywood. Mr. Peterson was sweating and breathing heavily when he was found.

Alan Johnson: RP 204-210

Mr. Johnson is a forensic technician with the Pierce County Sheriff's Department. Mr. Johnson analyzed a sample of the green vegetable matter discovered by Officer Petersen and confirmed that it was marijuana.

Richard Kennedy: RP 210-225

Mr. Kennedy is a property officer with the Pierce County Sheriff's Department. Mr. Kennedy confirmed that the material tested by Mr. Johnson is the same material submitted for testing by Officer Petersen.

Titus Peterson: RP 237-251

On the morning he was arrested, Mr. Peterson had been watching TV with his girlfriend until about 1:30 A.M. Mr. Peterson and his girlfriend got into a fight and she "stormed out of the house" at about 2:20 or 2:30. Mr. Peterson did not want his girlfriend to be out by herself, so he put on some clothes and went after her.

Mr. Peterson's girlfriend's aunt lives directly across I-5 from Mr. Peterson, so Mr. Peterson went there to look for her. Traffic was light so Mr. Peterson was able to just walk across the highway. As Mr. Peterson crossed the highway he heard sirens, but he knew they weren't for him.

As Mr. Peterson entered his girlfriend's aunt's yard, he was approached by police. When the police approached him he was not hiding

under a piece of plywood. The police asked Mr. Peterson what he was doing there and he told them he was looking for his girlfriend. Before Mr. Peterson had a chance to continue, he was hit with a “flapjack” and told to get on the ground.

After the first police approached Mr. Peterson, several more police approached him, wrestled him to the ground, beat and stomped on him, sprayed him with mace, and put him in a police car. Mr. Peterson was then taken to jail. Mr. Peterson suffered a cut above his eye and received treatment at the jail.

At the time he was arrested, Mr. Peterson was wearing a grey and white sweater, some jeans, and some bedroom slippers. Mr. Peterson was not wearing a white t-shirt.

Torvald Pearson: RP 261-270

Mr. Pearson is the records custodian for the Pierce County Jail. The inmate property inventory sheet completed when Mr. Peterson was booked into jail does not indicate that Mr. Peterson was wearing a sweater or slippers. Mr. Peterson signed the form indicating that the description of his clothing in the property inventory was accurate.

Steven Wilkins: RP 270-279

Mr. Wilkins is the manager for forensic investigations for the

Sheriff's Department. Mr. Wilkins reviewed the booking incident and booking photos of Mr. Peterson at the request of the prosecutor. Plaintiff's Exhibits 9 and 10 are the booking photos for Mr. Peterson that Mr. Wilkins found in the system.

Wilmer Melendez: RP 280-292

Mr. Melendez is a registered nurse for the Pierce County Sheriff. Mr. Melendez does medical assessments for inmates coming into the Pierce County Jail. Plaintiff's Exhibit 12 is a booking sheet used for inmates coming into jail where they are asked medical questions. Plaintiff's Exhibit 13 is progress notes for an inmate. Both documents deal with Mr. Peterson. The intake form gives no indication that Mr. Peterson had a head injury or was bleeding at the time he was booked. The progress notes indicate that Mr. Peterson complained of a laceration to his face on September 3rd. Prior to September 3rd there are no mentions to lacerations on Mr. Peterson's face, no mention of bruising, and no complaint about having been assaulted by police officers.

Luana Pitoitua: RP 306-309

In August of 2003, Ms. Pitoitua was woken up one morning by police cars coming around her house. She was woken up by the lights. Her doorbell rang and two Sheriffs (sic) were standing there. The Sheriffs (sic) told her

that they had found somebody in her back yard. Ms. Pitoitua does not know Mr. Peterson.

Stephen Shepherd- RP 314-321

In August of 2003 Mr. Shepherd was a patrol officer with the City of Tacoma. Mr. Shepherd monitored the pursuit of Mr. Peterson and located Mr. Peterson in a yard under a piece of plywood. Mr. Shepherd told Mr. Peterson that he was under arrest, but Mr. Peterson began to move away so Mr. Shepherd sprayed Mr. Peterson with pepper spray. Mr. Peterson was handcuffed but Mr. Shepherd did not strike Mr. Peterson in the face or body.

V. ARGUMENT

- 1. Mr. Peterson's right to be free from double jeopardy was violated when the trial court asked the jury to take new evidence and decide whether or not he was on community custody at the time the crimes were committed after the jury had returned its verdict.**

RCW 9.94A.525(17) provides that a judge will increase a defendant's offender score by one point if the offender was on community placement at the time of the current conviction.

The charges against Mr. Peterson in the first portion of the trial included the allegation that the crimes of assault in the third degree and attempted eluding of a police vehicle occurred while Mr. Peterson was on community custody. CP 20-23.

- A. *A jury must decide whether or not an offender was on community custody at the time of the crime in order for the sentencing court to add a point to the offender's offender score at sentencing.*

In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the U.S. Supreme Court affirmed its holding in *Apprendi v. New Jersey* that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 124 S.Ct. at 2536, citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). The court went on to hold that “when a judge inflicts a punishment that the jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.” *Blakely*, 124 S.Ct. at 2537 (citations omitted).

In *State v. Jones*, 126 Wn.App. 136, 107 P.3d 755, *review granted*, 155 Wn.2d 1017, 124 P.3d 659 (2005), Division I of the Court of Appeals ruled that *Blakely* applied to the addition of a point to an offender’s score for being on community custody at the time of the crime because, “[a]lthough the increase in offender score does not result in an exceptional sentence, the

added point increases the applicable standard range--the relevant statutory maximum.” *Jones*, 126 Wn.App at 140, 107 P.3d 755.

In *State v. Hochhalter*, 131 Wn.App. 506, 128 P.3d 104, (2006), Division II of the Court of Appeals agreed with *Jones* and held that a defendant has “a Sixth Amendment right to have a jury decide whether he was on community placement at the time of his current crimes.” *Hochhalter*, 131 Wn.App. at 522, 128 P.3d 104.¹

The issue of whether or not an offender is on community custody at the time a crime is committed must be decided by the jury.

B. *The initial jury verdict did not include a finding that Mr. Peterson was on community custody at the time the crimes were committed.*

The initial verdict entered by the jury was simply findings of guilt on various crimes, and included no special verdicts or findings related to whether or not Mr. Peterson was on community custody at the time the crimes were committed. CP 63-67, RP 392-398.

C. *Because the initial verdict entered by the jury was silent regarding the issue of Mr. Peterson’s community custody status, double jeopardy barred Mr. Peterson from being put on trial again to answer*

¹ It should be noted that in *State v. Giles*, 132 Wn.App. 738, 132 P.3d 1151 (2006) a different panel of Division II reached the opposite conclusion, and held that the trial court did not violate Giles's right to a jury trial when it added a point to his offender score because of his community placement status without the jury so finding.

that question.

The double jeopardy clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V; *State v. Corrado*, 81 Wn.App. 640, 645, 915 P.2d 1121 (1996), *review denied*, 138 Wn.2d 1011, 989 P.2d 1138 (1999). “Generally, it bars retrial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy ‘for the same offense.’” *Corrado*, 81 Wn.App. at 645, 915 P.2d 1121 (citations omitted).

As a general rule, jeopardy attaches in a jury trial when the jury is sworn. *Corrado*, 81 Wn.App. at 646, 915 P.2d 1121. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final. *Corrado*, 81 Wn.App. at 646, 647, 915 P.2d 1121. Also, jeopardy terminates when the State fails to produce evidence sufficient to prove its charge. *Burks v. United States*, 437 U.S. 1, 10-11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

[W]here an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts.

State v. Davis, 190 Wn.2d 164, 166, 67 P.2d 894 (1937).

“[S]entencing factors, like elements, [are] facts that have to be tried to the jury and proved beyond a reasonable doubt.” *Washington v. Recuenco*, 126 S.Ct. 2546, 2552, 165 L.Ed.2d 466 (2006).

Here, the third amended information included allegations that Mr. Peterson was on community custody at the time he committed the crimes. CP 20-23. However, the jury’s verdict was silent as to these allegations. CP 63-67, RP 392-398. The record indicates that the trial court accepted this verdict without a finding regarding Mr. Peterson’s community status because the trial court believed that the proper course of action was to “re-sit” the jury and have a second trial on the issue of Mr. Peterson’s community custody status. RP 392-402. As discussed below, the trial court’s belief was erroneous, and the trial court exceeded its authority in “re-sitting” the jury to take additional evidence and decide whether or not Mr. Peterson was on community custody.

Here, jeopardy had attached and terminated regarding the issue of Mr. Peterson’s community custody status. Because the information charged Mr. Peterson with having committed the crimes while on community custody and because the jury’s verdict was silent as to Mr. Peterson’s community custody status, Mr. Peterson should not have been tried a second time on the issue of whether he was on community custody at the time the crimes were committed.

D. *The trial court exceeded its statutory authority when it asked the jury to hear additional evidence to determine whether or not Mr. Peterson was on community custody at the time the crimes were committed.*

The trial court's discretion to impose a sentence is limited to that which is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence which has not been authorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 180-181, 713 P.2d 719, 718 P.2d 796 (1986). In *Ammons*, the court upheld the Sentencing Reform Act (SRA) against the challenge that it violated the separation of powers and infringed upon judicial discretion in sentencing. In upholding the SRA, the *Ammons* court affirmed long-standing authority that clearly recognizes (1) that the legislature has the sole authority to set the terms under which the trial court can impose punishment for crimes and (2) that the trial court has no independent inherent authority to punish for crimes. *Id.*

Sentencing is a legislative power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416

(1975), *overruled on other grounds*, 97 Wn.2d 590, 647 P.2d 1026 (1982).

“The Legislature provides the minimum and maximum terms within which the trial court may exercise its discretion in fixing sentence.” *State v. Le Pitre*, 54 Wn. 166, 169, 103 P. 27 (1909).

“If statutory sentencing procedures are not followed, the action of the court is void.” *State v. Theroff*, 33 Wn.App. 741, 744, 657 P.2d 800, *review denied*, 99 Wn.2d 1015 (1983); *State v. Eilts*, 94 Wn.2d 489, 495, 617 P.2d 993 (1980), *overruled on other grounds*, *State v. Barr*, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983). A defendant cannot extend the trial court’s sentencing authority, even by agreeing to it. *In re Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991).

CrR 6.16(b) allows a trial court to submit to a jury only such special interrogatories as are authorized by law. No statute authorizes a jury to determine whether or not a defendant was on community custody at the time he or she commits a crime.²

Where final judgment has been rendered and entered, “the trial court is no longer able to consider or correct errors which it may have made prior

² RCW 9.94A.537 does authorize taking evidence regarding certain enumerated aggravating factors to be presented to the jury in a special hearing after trial on the underlying crimes. However, whether or not a defendant was on community custody at the time of committing a crime is not one of the aggravating factors enumerated.

to judgment.” *Weber v. Snohomish Shingle Co.*, 37 Wn. 576, 581, 79 P. 1126 (1905).

Here, the verdict had been entered and the trial court was in the process of releasing the jury when the court clerk informed the trial court that was “another phase to this trial.” RP 398. The court then conducted a second trial, complete with new opening statements (RP 411-415), new witnesses (RP 416-422), new jury instructions (CP 28, RP 424), closing arguments (RP 425-427), and a new verdict. CP 68-69, RP 428-32.

While it is the province of the jury to determine whether or not Mr. Peterson was on community custody at the time he committed the crimes, this issue should have been addressed and put to the jury in the initial trial. Instead, Mr. Peterson was charged with having committed the crimes while on community custody, but the court, apparently through error (RP 398) neglected to instruct the jury and provide the jury with the requisite special verdict forms to allow the jury to decide the issue of Mr. Petersen’s community custody status. As discussed above, because the third amended information charged that Mr. Peterson was on community custody at the time he committed the crimes but the jury had already entered its verdict, double jeopardy attached and barred Mr. Peterson from being re-tried regarding his community custody status. The trial court lacked the authority to restart the

trial process and conduct an entirely new trial simply to determine whether or not Mr. Peterson's community custody status.

Because the jury returned its initial verdict without addressing the issue of Mr. Peterson's community custody status, and because jeopardy had attached regarding that issue, at the close of the initial trial it must be presumed that the jury did not find that Mr. Peterson was on community custody at the time the crimes were committed. It was therefore a violation of double jeopardy for the trial court to hold a second trial to determine that issue. Further, the trial court lacked the authority to hold a second trial simply to determine Mr. Peterson's custody status at the time the crimes were committed.

Mr. Peterson should not have had a point added to his offender score at sentencing based on a determination that he was on community custody at the time the crimes were committed.

2. **Mr. Peterson's offender score was improperly calculated based on his out of State conviction where the State failed to provide sufficient evidence for the trial court to perform the mandatory comparability analysis and where no comparability analysis was performed.**

The use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d

472, 479-480, 973 P.2d 452, (1999), *review denied on appeal after remand* 142 Wn.2d. 1003, 11 P.3d 824 (2000). An out-of-state conviction may not be used to increase the defendant's offender score unless the State proves it is a felony in Washington. *State v. Cabrera*, 73 Wn.App. 165, 168, 868 P.2d 179 (1994); *State v. Ford*, 87 Wn.App. 794, 942 P.2d 1064 (1997), *review granted* 134 Wn.2d 1019, 958 P.2d 316, *reversed on other grounds and remanded* 137 Wn.2d 472, 973 P.2d 452 (1999). Where the state seeks to use prior out-of-state convictions to calculate an offender score, the State must prove the conviction would be a felony under Washington law and must identify what Washington law would be violated by the conduct “according to the comparable offense definitions and sentences provided by Washington law.” *Ford*, 137 Wn.2d at 479-480, 973 P.2d 452. Further, “[t]o properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes.” *Ford*, 137 Wn.2d at 479, 973 P.2d 452.

For purposes of calculating an offender score based on prior out-of-state convictions, the best evidence of a prior conviction is a certified copy of the judgment; however, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal

history. *State v. Gill*, 103 Wn.App 435, 448, 13 P.3d 646 (2000), citing *Ford*, 137 Wn.2d at 480, 973 P.2d 452.

The SRA expressly places on the State the burdens of introducing evidence of some kind to support the alleged criminal history and including evidence supporting the classification of out-of-state convictions as Washington felonies because it is inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove. *Ford*, 137 Wn.2d at 480, 973 P.2d 452. This comparison must be conducted on the record. *State v. Labarbera*, 128 Wn.App. 343, 349, 115 P.3d 1038 (2005).

Thus, the State bears the burden of ensuring the record supports the existence and classification of out-of-state convictions, and, should the state fail to establish a sufficient record, the sentencing court is without the necessary evidence to reach a proper decision and it is impossible to determine whether the convictions are properly included in the offender score. *Ford*, 137 Wn.2d at 480-481, 973 P.2d 452.

Challenges to the classification of prior out-of-state convictions, used in calculating offender score under the SRA, may be raised for the first time on appeal. *Ford*, 137 Wn.2d at 477-478, 973 P.2d 452.

A. *The State presented insufficient evidence to allow the*

court to perform the required comparability analysis between Mr. Peterson's Maryland convictions and Washington law.

At sentencing, the State handed forward to the court, but failed to enter into the record, certified copies of Mr. Peterson's convictions from Maryland. CP 441. The State urged the trial court to adopt the State's calculation of Mr. Peterson's offender score as set forth in the State's Memorandum Re: Prior Record and Offender Score. CP 72-73, RP 441. The State provided no other information to the trial court regarding Mr. Peterson's Maryland convictions. Counsel for Mr. Peterson insisted that the State bore the burden of proving that the elements of the Maryland crimes were comparable to the elements of a felony in Washington State. RP 444.

The State's Memorandum does not include any details regarding the Maryland convictions other than the names of the crimes. CP 72-73. Because the Judgments and Sentences of the Maryland crimes were not entered into the record, it is unknown how much information was contained in those documents.

The State did not provide the trial court with copies of the applicable Maryland statutes and did not identify the equivalent Washington crimes. The State failed to both identify for the trial court the comparable Washington crimes and provide the trial court with a sufficient basis for the

trial court to perform the necessary comparability analysis. Because the State failed to identify equivalent Washington felonies and because the State presented insufficient evidence to make any comparison between the relevant Maryland statutes and Washington statutes, the State failed to prove that the Maryland convictions were equivalent to felonies in Washington. Therefore, it was error for Mr. Peterson's Maryland convictions to be considered in calculating his offender score.

B. *No comparability analysis was performed.*

Here, the trial court conducted no comparability analysis between the Maryland convictions and Washington law on the record. Because this analysis must be performed in order for the Maryland convictions to be considered in calculating Mr. Peterson's offender score, Mr. Peterson's Maryland convictions could not have properly been considered in calculating his offender score.

C. *On remand, the trial court cannot consider Mr. Peterson's Maryland convictions for sentencing.*

[W]hen the defendant objects to the calculation of his offender score and the State does not provide the additional necessary evidence of the comparability of the out-of-state convictions at the time of sentencing, the State is held to the existing record on remand and the defendant is resentenced without including the out-of-state conviction.

Labarbera, 128 Wn.App. at 350, 115 P.3d 1038, citing *Ford*, 137 Wn.2d at

485, 973 P.2d 452.

Here, trial counsel for Mr. Peterson objected to the State's calculation of Mr. Peterson's offender score. RP 444. The State provided no more evidence prior to sentencing regarding Mr. Peterson's convictions or the comparability between the Maryland convictions and Washington law. On remand, the trial court may not consider Mr. Peterson's Maryland convictions at sentencing.

3. A defendant does not receive effective assistance of counsel where his attorney fails to present a motion which, if granted, would reduce the defendant's offender score at sentencing.

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362,

37 P.3d 280 (2002), *cert. denied*, 126 S.Ct. 2294, 164 L.Ed. 820 (2006) (citing *State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993)).

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689). If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

The remedy for ineffective assistance of counsel is remand for a new trial. See *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

A. *It was not objectively reasonable nor was it legitimate*

trial strategy for Mr. Peterson's trial counsel to fail to move the court to consider the third degree assault and the attempting to elude charges as the same criminal conduct for purposes of sentencing.

Under RCW 9.94A.589(1)(a), when a person is convicted of two or more crimes, they are counted separately to determine the offender score and the standard range for sentencing, except:

[I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. 'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim....

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

Thus in order for separate offenses to "encompass the same criminal conduct" under RCW 9.94A.589(1)(a), three elements must be present: (1) same criminal intent, (2) same time and place, and (3) same victim. For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged; rather, the relevant inquiry is

“the extent to which the criminal intent, objectively viewed, changed from one crime to the next.... This, in turn, can be measured in part by whether one crime furthered the other.” *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998), *citing State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

Here, Mr. Peterson was charged with both attempting to elude a pursuing police vehicle and assault in the third degree based on his reversing his vehicle towards the police cruiser driven by Deputy Petersen. At the time Mr. Peterson reversed his car towards the police cruiser, he had already made several turns and was attempting to execute a u-turn to get away from the police.

The State presented no evidence that Mr. Peterson’s intent at the time he backed his car up was anything other than to flee the police. The “victims” of Mr. Peterson acts of attempting to elude the police and his reversing of his car were the police; the reversing of Mr. Peterson’s car occurred while Mr. Peterson was attempting to drive away from the police; and Mr. Peterson backed his car towards the police cruiser during his attempts to elude the police. Mr. Peterson’s intent in backing his vehicle towards the police cruiser was to complete the u-turn and drive away from the police. His intent in reversing his vehicle furthered his intent in eluding the police. Therefore, the crimes of attempting to elude a pursuing police vehicle

and assault in the third degree were actually the same criminal conduct for purposes of sentencing.

B. *Mr. Peterson was prejudiced by his trial counsel's deficient performance.*

Had the trial court considered the crimes to be the same criminal conduct for purposes of sentencing, Mr. Peterson would have had a lower offender score at sentencing and would have received a shorter sentence.

4. There was insufficient evidence to convict Mr. Peterson of assault in the third degree.

To show third degree assault, the State had the burden of proving three elements: (1) that, under circumstances not amounting to first or second degree assault, Mr. Peterson assaulted another; (2) with the intent of assaulting a law enforcement officer; (3) while the law enforcement officer was performing his or her official duties. RCW 9A.36.031(g). Because the term assault is not statutorily defined, Washington courts apply the common law definitions to the crime. *State v. Walden*, 67 Wn.App. 891, 893, 841 P.2d 81 (1992). Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (actual battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). *State v.*

Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

When Mr. Peterson reversed his vehicle at the police cruiser, his intent was to elude police, not assault the officers. Mr. Peterson's vehicle never struck any officer and the State presented no evidence that Deputy Petersen or Officer Martin was placed in apprehension of harm.

The State presented insufficient evidence to establish that Mr. Peterson's actions were an attempt to inflict bodily injury on another (attempted battery), that Mr. Petersen ever unlawfully touched another person with criminal intent (actual battery), or that Mr. Peterson's actions put another in apprehension of harm (common law assault).

The State presented insufficient evidence to convict Mr. Peterson of assault in the third degree.

VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. Peterson's conviction for assault in the third degree and remand this case for a new trial without consideration of Mr. Peterson's Maryland convictions and without consideration of whether or not Mr. Peterson was on community custody at the time the crimes were committed.

