NO. 34777-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TITUS PETERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 03-1-03896-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly find that defendant was on community custody when he committed third degree assault and attempting to elude a police officer?

2. Was the court's use of defendant's Maryland convictions harmless?

3. Was the defendant provided effective assistance of counsel?

4. Did the jury have sufficient evidence to find defendant guilty of third degree assault when he made eye-contact with Officer Peterson, waited until Officer Peterson pulled behind his car, and then sped at Officer Peterson's patrol car in reverse?

B. STATEMENT OF THE CASE.

1. Procedure

a. Trial on the Merits

On August 21, 2003, the Pierce County prosecutor's office filed an information charging TITUS DION PETERSON, hereinafter "defendant," with assault in the second degree, possessing stolen property in the first degree, attempting to elude a pursuing police vehicle, unlawful possession of a controlled substance – marihuana, and no valid operator's license. CP

1-5. The State amended the information twice, eventually charging defendant with assault in the third degree, taking a motor vehicle without permission in the second degree, attempting to elude a pursuing police vehicle, obstructing a law enforcement officer, making a false or misleading statement to a public servant, unlawful possession of a controlled substance – forty grams or less of marihuana, no valid operator's license, and tampering with a witness. CP 20-23.

The matter proceeded to a jury trial on February 22, 2006. RP 52. During trial, the State dismissed the charges of taking a motor vehicle without permission in the second degree and tampering with a witness. RP 226-227. On March 21, 2006, the jury found defendant guilty 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 63-67.

b. Community Placement Finding

After the jury returned its guilty verdict, the court held a hearing to allow the same jury to decide whether defendant was on community placement while he committed the crimes of assault in the third degree and attempting to elude a pursuing police vehicle (counts I and III). RP 397-415. The court chose this course of action because it was not clear at the time whether Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), required a jury to make the community custody determination. RP 404. The court instructed the jury regarding the

purpose of the hearing; defendant did not object to these instructions or propose any instructions of his own. RP 401-404. During this hearing, the State called Kelly Plamondon, a community corrections officer, to testify that defendant was on community custody during the dates on which he committed the assault and the attempt to elude. RP 416-421. The jury returned a special finding that defendant was on community custody when he committed the third degree assault (count I) and attempting to elude (count III). CP 68, 69, 72-73.

c. Sentencing

At sentencing, the State calculated that defendant's prior Washington convictions gave him an offender score of eight. RP 441-442; CP 72-73. The fact that he was on community custody when he committed assault and attempting to elude added one point to his offender score. RP 441-442; CP 72-73. The State also admitted evidence that defendant had been convicted of two felonies in Maryland which would also add two points to defendant's offender score. RP 441-442; CP 72-73. Ultimately, the State calculated defendant's offender score as 11. RP 441-442; CP 72-73. It recommended that the court find that defendant had an offender score of 11. CP 72-73. The State asked the court not to sentence defendant to any time for counts IV, VI, and VII of the information. CP 72-73. It recommended that the court sentence defendant to a total of 60 months of confinement for the third degree assault and attempt to elude charges (counts I and III). RP 441-442; CP 72-73.

Defendant argued that the court should not consider the Maryland convictions because the State had not met its burden of showing that the crimes were comparable to Washington felonies. RP 443-444. The court accepted the Maryland conviction evidence and found that the Maryland convictions were felonies. RP 453. It sentenced defendant to 60 months of confinement and nine to eighteen months of community supervision. RP 451, 453; CP 74-85. It also ordered monetary penalties. RP 451; CP 74-85. Defendant filed a timely notice of appeal. CP 88.

2. Facts

Officer Russel Martin and Deputy Jesse Peterson from the Pierce County Sheriff's Department were on patrol at midnight on August 21, 2003. RP 84, 85, 118, 120. Deputy Peterson was driving the police cruiser at the time. RP 123. While the two were driving eastbound on 96th Street in Lakewood, defendant drove past them in the opposite direction with his only his parking lights on. RP 84, 88, 121. After defendant passed the officers, Deputy Peterson turned around, activated his emergency lights, and attempted to pull over defendant's vehicle. RP 88-89, 123, 124. Instead of pulling over, however, defendant slowed down to five to ten miles per hour and drove partly on the right-hand shoulder of the road. RP 88-89, 125. The officers followed defendant for a time, and then defendant turned left across the oncoming lane of traffic as if he were going to make a u-turn and go in the opposite direction. RP 90, 125, 126.

Deputy Peterson pulled up near defendant's car, and defendant looked over to Deputy Peterson, made eye-contact with him, and made a gesture to Deputy Peterson. RP 90, 126. In accordance with police procedure, Deputy Peterson tried to pull behind defendant's car in such a way as to direct more light from his headlights onto defendant's vehicle. RP 90, 126. When Deputy Peterson's car was behind defendant, defendant shifted his own vehicle into reverse and sped backwards at Deputy Peterson. RP 91-92, 126-128. Deputy Peterson accelerated quickly in order to avoid being struck by defendant's vehicle. RP 92, 127. If Deputy Peterson had not sped up quickly, defendant's vehicle would have hit Deputy Peterson. RP 92, 127.

After speeding backward, defendant shifted into drive and drove off in the direction from which he had come. RP 92, 129. Deputy Peterson and Officer Martin followed in pursuit and called other officers to assist with the chase. RP 94, 131. Eventually Deputy Eric Honeycutt of the Pierce County Sheriff's Department, Wendy Haddow, a K-9 officer from the Tacoma Police Department, and Ryan Lee of the Tacoma Police Department, joined the pursuit. RP 152, 174, 185.

Defendant led the officers on a chase that went from Lakewood to Tacoma and back to Lakewood. RP 101. During the chase, defendant drove up onto a sidewalk, between two poles holding a sign, and into a parking lot before returning to the road. RP 100, 159. Deputy Honeycutt used stop sticks during the chase to deflate defendant's tires, but defendant

continued to drive on the rims of his wheels at speeds of 70 miles per hour. RP 135, 158. Deputy Honeycutt used a PIT maneuver[1] twice before defendant came to a complete stop near Lakewood. RP 101, 157, 160.

When defendant stopped, he left his vehicle and ran toward some nearby houses. RP 178, 188. As he ran, he dropped a leather jacket he had been wearing. RP 178, 181. The police officers chased him and watched as he jumped over a residential fence. RP 178, 188. As Officer Haddow was following defendant with her dog, the dog alerted on the jacket that defendant dropped while he was running. RP 178, 181. Officer Peterson found marihuana in the jacket. RP 198. The other officers jumped the fence that defendant had jumped and found him hiding behind a piece of plywood in a backyard. RP 178, 181.

Defendant testified at trial and did not call any other witnesses. RP 237. Defendant claimed that he was not driving that evening. RP 273. He said he was with his girlfriend at their apartment near Interstate Five on August 21, 2003. RP 237. He said that he and his girlfriend had a fight sometime around 2:20 a.m. on August 22, 2003, and that she left the apartment. RP 238. Defendant claimed that his girlfriend's aunt lived across Interstate Five and that he believed his girlfriend had gone to her

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[1] PIT stands for Pursuit Intervention Technique. RP 156. During a PIT maneuver, an officer brings the front quarter panel of the police cruise next to another vehicle's rear quarter panel. RP 156. The officer then turns the police vehicle towards the other vehicle and accelerates, causing the other vehicle to spin out of control. RP 156. This maneuver kills the other vehicle's engine. RP 156.

aunt's house. RP 238-239. Defendant testified that he left his apartment wearing slippers, ran across the Interstate, and began to go to his girlfriend's aunt's house to look for his girlfriend. RP 238-240, 251. He said that as he was in the aunt's yard, police officers came up to him, asked who he was, and arrested him. RP 240, 241.

C. ARGUMENT.

1. THE COURT PROPERLY FOUND THAT THE DEFENDANT WAS ON COMMUNITY CUSTODY WHEN HE COMMITTED THIRD DEGREE ASSAULT AND ATTEMPTING TO ELUDE A POLICE OFFICER.

a. A convicted person does not have a right to have a jury determine that a person was on community custody at the time he committed a crime.

Under Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531; 159 L.Ed.2d 403 (2004), "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." The "relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Id. at 473.

When defendant was convicted and sentenced in this case, Washington's Appellate Division was divided as to whether Blakely required a jury to determine a defendant's community custody status at the time of the alleged crime. Division One had held that Blakely required a

jury to make a community custody determination, Division Three had held that the court could make the determination without a jury, and Division Two had adopted both positions. See State v. Jones, 126 Wn. App. 136, 107 P.3d 755 (2005),[2] State v. Hunt, 128 Wn. App. 535, 116 P.3d 450 (2005), State v. Hochalter, 131 Wn. App. 506, 128 P.3d 104 (2006), State v. Giles, 132 Wn. App. 738, 132 P.3d 1151 (2006).

In State v. Hochalter, 131 Wn. App. 506, this Court specifically adopted Division One's reasoning from State v. Jones, 126 Wn. App. 136, holding 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." Id. at 520-22 (citing Jones, 126 Wn. App. 136).

In State v. Giles, 132 Wn. App. 738, this Court held that a court can determine community custody status without the aid of a jury. Id. at 741-42. The Giles court specifically adopted Division Three's reasoning in State v. Hunt, 128 Wn. App. 535:

> (1) Blakely does not impact Washington's offender scoring system; (2) judicial fact-finding is permitted when establishing recommended standard range sentences, and (3) Blakely's Sixth Amendment jury-trial right is implicated only when the trial court finds facts to impose an exceptional sentence higher than the standard range sentence.

Id. at 741 (citing Hunt, 128 Wn. App. at 541, internal quotations omitted).

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[2] State v. Jones, 126 Wn. App. 136, was recently reversed by the Washington Supreme Court, as discussed below.

The Giles court found that when a court "merely determine[s]" a defendant's "standard sentencing range and [does] not impose an exceptional sentence, ... its actions do not implicate Blakely." Id. at 741-42.

The Washington Supreme Court resolved this divide when the State appealed Division One's decision in State v. Jones, 126 Wn. App. 136. See State v. Jones, __ Wn.2d __, __ P.3d __, (2006). The Washington Supreme Court reversed Division One, holding that

> because community custody is directly related to and follows from the fact of a prior conviction and ...the attendant factual determinations involve nothing more than a review of the nature of the defendant's criminal history and the defendant's offender characteristics, such a determination is properly made by the sentencing judge.

Id. at __.

In the present case, the trial court did not have the benefit of the Washington Supreme Court's decision, so it chose to apply Blakely in a prophylactic way that best ensured that defendant's rights were protected. The trial court conservatively decided to allow the jury to determine defendant's community custody status after deciding the question of guilt. This course of action allowed the defendant the benefit of a jury determination of his community custody status even though he was not entitled to such a benefit. See Jones, __ Wn.2d __. This course of action also protected the defendant from unfairly prejudicial preponderance evidence by ensuring that the jury did not hear about defendant's prior

convictions until *after* it had determined that he was guilty of the underlying crime. See ER 403 and ER 404. Thus, the trial court did not violate defendant's rights under Blakely; in fact, it took the course most likely to preserve defendant's Sixth Amendment rights in light of conflicting authority on the issue.

The court could have determined that defendant was on community custody without the aid of a jury. By allowing a jury to make the community custody status determination, the court chose the course of action that would best protect defendant's rights at a time when it was unclear what the Sixth Amendment required. The trial court did not violate defendant's Sixth Amendment right to a jury. Defendant can cite to no authority that specifically prohibits a jury from determining community custody status.

b. The procedure that the trial court used in this case does not implicate double jeopardy.

The Fifth Amendment to the United States Constitution provides:

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb....

U. S. Const. amend V. The state constitutional rule against double jeopardy found in Art. I, sec. 9, offers the same scope of protection as its federal counterpart. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267

(1995). The double jeopardy clause protects a criminal defendant from multiple or successive prosecutions for the same offense and from the imposition of multiple punishments for the same offense. Gocken, 127 Wn.2d at 100. An appellate court reviews claims of double jeopardy violation de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Such claims may be raised for the first time on appeal. RAP 2.5(a)(3). The case before the court does not involve issues relating to multiple or successive prosecutions. After a person has been convicted, the court must add one point to the person's offender score if that person was on community custody at the time he committed the crime. RCW 9.94A.525(18).

The double jeopardy clause only applies when

> three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy 'for the same offense.'

In re Maxfield, 81 Wn. App. 705, 709-10, 915 P.2d 1134 (1996). Jeopardy attaches when in a jury trial when a jury is sworn, State v. Chiles, 53 Wn. App. 452, 767 P.2d 597 (1989), it terminates when the jury reaches a conviction that is final. State v. Ervin, 158 Wn.2d 746, 752-53, __ P.3d __ (2006). "Put differently, jeopardy terminates once the State has had--but not before the State has had--one full and fair opportunity to prosecute." State v. Linton, 156 Wn.2d 777, 790, 132 P.3d 127 (2006) (internal quotations omitted). "[W]here the same act or transaction

constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." State v. Gregory, ___ Wn.2d ___, 147 P.3d 1201 (2006).

Double jeopardy was never implicated in this case. Jeopardy attached here when the jury was sworn in and terminated when the jury returned its verdict, but defendant was never "again in jeopardy for the same offense[s]" for which he was convicted during the first phase of the trial. In re Maxfield, 81 Wn. App. at 709-10 (internal quotations omitted). The second phase of the trial was not a separate trial to which jeopardy could attach. The trial court bifurcated a single trial into two phases that were designed to protect defendant's Sixth Amendment rights. The court did not swear a new jury for the second phase, and the State did not file new charges against defendant, so there was no opportunity for jeopardy to attach a second time.

Moreover, the second phase of the trial was not designed to determine any matters that the jury had already decided. The jury initially convicted defendant of third degree assault, attempting to elude a pursuing police vehicle, obstructing a law enforcement officer, unlawful possession of a controlled substance, and driving without a valid operator's license. CP (29-62) When it then determined whether defendant was on community custody, it did not re-convict the defendant. In fact, the second phase of the trial did not address any crime at all. The question of

whether defendant was on community custody was simply a fact that the court used to calculate defendant's offender score. RCW 9.94A.525(18) requires the court to add one point to the offender score of a person who committed a crime while on community placement; it does not separately criminalize the act of committing a crime while on community custody.

Thus, defendant was not retried for any crime of which he had already been convicted. The court did not hold a second trial, and the jury was not asked to determine whether defendant had committed any crimes at all.

2. THE COURT'S USE OF DEFENDANT'S MARYLAND CONVICTIONS WAS HARMLESS.

a. The trial court's failure to perform a comparability analysis is harmless.

Defendant's standard range sentence was not affected when the court used his Maryland convictions to calculate his offender score. A convicted defendant's standard range sentence is determined by first calculating the defendant's offender score and then determining the offense seriousness score. RCW 9.94A.530(1). The sentencing court then uses a grid on which offender scores appear above each column, and offense seriousness scores appear before each row (this sentencing grid appears at RCW 9.94A.510). See RCW 9.94A.530(1). A convicted defendant's standard range sentence is the range that appears at the

intersection of the column and row representing that defendant's offender score and offense seriousness score. RCW 9.94A.530(1). An offender score that is worth more than nine points yields the same standard range as an offender score of nine because the heading of the last column on the sentencing grid applies to offender scores of "9 or more." RCW 9.94A.510.

A sentencing court may use a convicted defendant's prior out-of-state convictions when it calculates that defendant's offender score. RCW 94A.525(3). In addition to proving the existence of an out-of-state conviction, it should be shown that the out-of-state felony is comparable to a Washington felony. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). When a court uses out-of-state convictions to calculate a convicted defendant's offender score, it must 1) convert the out-of-state crime into its Washington equivalent, 2) determine the relevant sentencing consequences of the Washington counterpart, 3) assign those same sentencing consequences to the out-of-state conviction. State v. Russell, 104 Wn. App. 422, 16 P.3d 664 (2001).

The State bears the burden of showing that an out-of-state conviction is equivalent to an in-state conviction. State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999); State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999). This classification should occur at the sentencing hearing; it is a mandatory step in the sentencing process. State v. Beals,

100 Wn. App. 189, 997 P.2d 941 (2000). The court must determine whether Washington would consider the crime a felony; it is irrelevant how the other state classified the crime. State v. Brown, 47 Wn. App. 565, 736 P.2d 693 (1987), aff'd, 113 Wn.2d 520, 782 P.2d 1013 (1989).

An appellate court will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). An erroneous offender score calculation is harmless where the standard sentencing range would remain the same even if defendant's offender score had been calculated properly. State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996). Here, the State provided the court with evidence of defendant's prior Washington and Maryland convictions. RP 441-442; CP 72-73, 96-114. The court, however, did not perform a comparability analysis of the Maryland convictions on the record.

The court's failure to perform a comparability analysis on the record is harmless because his standard range sentence would have been the same even if the Maryland convictions were not part of the offender score calculation. The defendant's offender score was over nine points. The State here provided a calculation of defendant's offender score to the court during the sentencing hearing. RP 441-442; CP 72-73. This calculation separately calculated defendant's offender score points for his prior Washington felonies, and then calculated the points he received for his Maryland felonies. CP 72-73. The Washington State felonies gave the

defendant a score of 8, and he received one more point for committing the current offenses while he was on community custody. CP 72. Thus, defendant's prior Washington convictions and his community custody status gave him an offender score of nine. CP 72.

Although the two Maryland convictions added two points to this score, they had no effect on defendant's standard range because the offender score had reached nine before they were applied. CP 72-73. The court demonstrated that it adopted this calculation by using an offender score of "9+" on the warrant and commitment. CP 74-85. The defendant is not disputing any of his Washington felony convictions on appeal.

The court's failure to perform a comparability analysis on the record was harmless because defendant's standard range would not change even if it had not counted the Maryland convictions. If the court counted the Maryland convictions, defendant's offender score was 11; if it didn't, defendant's offender score was nine. Either way, defendant's offender score placed him in the last column of the sentencing grid. RCW 9.94A.510. Defendant has not challenged his offender seriousness score, so his range is the same whether his offender score is 11 or nine. Because defendant's standard sentencing range would remain the same whether defendant's offender score was 11 or nine, the error in the trial court's calculation of the offender score did not affect defendant's standard range. The court's mistake was thus harmless. See Argo, 81 Wn. App. at 569.

b. The trial court can consider the Maryland convictions if this Court remands this case.

If the court believes that the error in this case was not harmless, then it should remand this case so that the trial court can perform a comparability analysis and resentence defendant. In determining whether an out-of-state conviction adds points to an offender score, the court should focus on the actual crime the defendant was convicted of committing and the mental state involved, not the amount of time the defendant served for the offense. State v. Franklin, 46 Wn. App. 84, 729 P.2d 70 (1986). The State may prove the classification of out-of-state convictions as being comparable to a Washington felony by presenting "evidence of the classification of the out-of-state convictions in order to carry its burden of proving the convictions by a preponderance of the evidence. Id. at 169. Where the State presents information relating to comparability and the trial court fails to consider it on the record, the proper relief is to "remand for resentencing for comparability analysis based on the information before the court at the original sentencing." State v. Labarbera, 128 Wn. App. 343, 350, 115 P.3d 1038 (2005).

Here, the State offered ample evidence that the Maryland crimes were comparable to Washington crimes. The State offered the Maryland judgment and sentence for the crimes of assault with intent to avoid lawful apprehension and distribution of a controlled substance, the charging application (which listed the way in which each crime was committed), the

grand jury indictment, and the Maryland court docket noting convictions for assault with intent to avoid lawful apprehension and distribution of a controlled substance. RP 441-442; CP 96-113. During the sentencing hearing, the State argued that these crimes were similar, and the court accepted the documentation into evidence. RP 441-442; CP 114. Although it had the evidence before it, the court did not perform a comparability analysis on the record during the sentencing hearing.

Defendant argues that, if this Court remands this case, the sentencing court cannot perform a comparability analysis on the Maryland convictions. Br. of Appellant at 25-26. Defendant cites no authority that supports this argument, however. The only case defendant does cite is Labarbera, 128 Wn. App. 343, which specifically allows the trial court to perform a "comparability analysis based on the information before the court at the original sentencing." Id. Labarbera holds the State to the "existing record" and only prohibits the State from introducing *new* evidence of out-of-state convictions. Id. As discussed above, the sentencing court in this case had ample evidence with which to conduct a comparability analysis on the Maryland convictions. Nothing prohibits the court on remand from conducting that analysis using the information originally before it.

If this Court determines that the error in this case was not harmless, then it should remand this case for resentencing and instruct the sentencing court to perform a comparability analysis on the Maryland

convictions using the information that was before it at the initial sentencing hearing. See Labarbera, 128 Wn. App. at 350.

3. THE DEFENDANT WAS PROVIDED WITH EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a

reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena

necessary witnesses. Id. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Defendant claims that trial counsel should have asked the court to consider third degree assault (count I), and attempting to elude a pursuing police vehicle (count III), as the same course of conduct for sentencing purposes. CP 20-23; Br. of Appellant at 26-30. Defense counsel, however, was not deficient for not asking the court to consider these counts as the same course of conduct, and defendant was not prejudiced by this decision.

a. Mr. Oliver's performance was not deficient.

First, defense counsel's performance was not deficient. Defense counsel admitted during the sentencing hearing that he was afraid that he was becoming a "stop monger" during sentencing. RP 444. Because the court has so much discretion to sentence a defendant to either the high or the low end of his standard range, defense counsel may have felt that raising too many issues during sentencing might alienate the court and eventually hurt his client's chances of getting a lower range sentence. Thus, defense counsel may reasonably have chosen to pursue his objection to the offender score calculation instead of asking the court to consider counts I and III the same course of conduct. He may have felt that he had to choose between these courses because pursuing both would alienate the

court. He may further have reasoned that, if he had to choose one route, he had a better chance of challenging the offender score calculation.

b. Defense counsel's performance did not prejudice defendant because the court would not have considered counts I and III the same course of conduct.

Second, defense counsel's performance did not prejudice defendant because the court would not have found that counts I and III constituted the same criminal conduct. Under RCW 9.94A.589(1)(a), two crimes are considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). If one of these elements is missing, then the crimes cannot constitute the same criminal conduct. Lessley, 118 Wn.2d at 778; Vike, 125 Wn.2d at 410. "Intent" does not mean a particular mens rea element of a charge, but rather the offender's objective intent in committing the crime. In re Holmes, 69 Wn. App. 282, 290, 848 P.2d 754 (1993). In determining a shift in intent, "trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

i. The two crimes had different criminal intents.

The two crimes had different criminal intents. Jury instruction number 19 told the jury that, to convict defendant of third degree assault (count I), it must find

> (1) That on or about the 21st day of August, 2003, the **defendant assaulted** Jesse Peterson;
> (2) That at the time of the assault, Jesse Peterson was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
> (3) That the acts occurred in the state of Washington.

CP 29-54 (emphasis added). Instruction number seven told the jury that, to commit assault, a person must intend to touch or strike Officer Peterson, inflict bodily injury on Officer Peterson, or make Officer Peterson fear bodily injury. CP 29-54. Instruction number eight told the jury that a person acts with intent when he acts with the objective of accomplishing a result which is a crime. CP 29-54.

Jury instruction number 20 told the jury that, to convict defendant of attempting to elude a pursuing police vehicle (count III), it must find

> (1) That on or about the 21st day of August, 2003, the defendant drove a motor vehicle;
> (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
> (3) That the signaling police officer's vehicle was appropriately marked, showing it to be an official police vehicle;

> (4) That the defendant **willfully failed or refused to immediately bring the vehicle to a stop** after being signaled to stop;
> (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner;
> (6) That the acts occurred in the state of Washington.

CP 29-54 (emphasis added). Instruction number 11 told the jury that a person acts willfully when they act knowingly. CP 29-54.

Thus, by finding defendant guilty of count I, the jury found that he intended to either touch, strike, harm, or frighten Officer Peterson, in this case by rapidly reversing towards Officer Peterson. RP 90-94, 126-129. By convicting defendant of count III, the jury found that he failed to pull over his vehicle and knew that he was not pulling over. The intent to strike, touch, harm, or frighten another is certainly different from the knowledge that one is not pulling over a vehicle. Because the intent for count I is different from the intent necessary to convict defendant of count III, the two crimes are separate courses of conduct.

Moreover, defendant's actions showed an objective change in his intent. When defendant made eye-contact with Officer Petersen, waited for Officer Petersen to pull behind him, and then reversed his own vehicle at a high speed, defendant manifested the intent to hit Officer Petersen's cruiser and to hurt Officer Petersen. RP 90-94, 126-129. If defendant had simply intended to escape, then he would not have waited until Officer Petersen was behind him, he would not have backed up so quickly, and he

would have made some attempt to avoid hitting Officer Petersen. After defendant attempted to hit Officer Petersen's cruiser, defendant shifted his own vehicle into drive and drove away at a high rate of speed. RP 94-95, 129-130. This change of direction and the physical act of shifting into drive manifested defendant's change in intent from attempting to inflict harm to attempting to elude the police.

ii. The two crimes were committed at different times and places.

The two crimes were committed at separate times and places. Defendant committed third degree assault on a single side road when he attempted to run into Officer Petersen. RP 88-91, 125-126. His commission of attempting to elude the police ranged over several counties and took the police on a pursuit from side roads to interstates and back. RP 88-91, 95-101, 125, 131-136, 155, 159. While eluding did occur, among other places, on the same road as the assault, the assault was confined to 26th Street. RP 126.

iii. The two crimes had different victims.

The two crimes involved different victims. When defendant assaulted Officer Petersen, that crime was limited to Officer Petersen and possibly his passenger, Officer Martin. RP 90-94, 126-129. When defendant attempted to elude the police officers at high speeds, he became a danger to the public at large by running through 15 red lights and stop

signs, traveling well above the speed limit, swerving into oncoming lanes on the road, and speeding onto sidewalks and through parking lots. RP 94-97, 101, 131-136, 159-160. Certainly the police officers were in danger when they were chasing defendant through the streets, but defendant was threatening the public at large in addition to threatening the police officers' safety.

Because none of the three elements of same course of conduct were satisfied when defendant committed the crimes of third degree assault and attempting to elude police officers, those two crimes did not constitute the same course of conduct. If defense counsel had requested that the court consider those two crimes as the same course of conduct, the court would have denied his request. Because defendant's sentence would not have been affected by a request to consider counts I and III as the same course of conduct, defendant was not prejudiced by defense counsel's decision not to make that request.

4. THE JURY HAD SUFFICIENT EVIDENCE TO FIND THAT DEFENDANT COMMITTED THIRD DEGREE ASSAULT WHEN HE TRIED TO BACK INTO OFFICER PETERSEN'S CAR.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Salinas, 119 Wn.2d 192; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations

should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> [G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person is guilty of assault in the third degree if that person "[a]ssaults a law enforcement officer... who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g). The term "assault" is not statutorily defined, so Washington courts apply the common law definition to the crime. State v. Aumick, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995). An assault is an attempt, with unlawful force, to inflict bodily injury upon another, whether or not the victim is actually harmed. State v. Aumick, 126 Wn.2d 422; CP 66-91. Thus, the State proved that defendant committed third degree assault if it proved (1) that defendant attempted to inflict bodily injury on a law enforcement officer with unlawful force, and (2) that the law enforcement officer was performing his official duties at the time.

Defendant attempted to inflict bodily injury on Officer Petersen with unlawful force. When defendant pulled up perpendicular to the road,

Officer Petersen arrived and initially stopped near enough to see defendant's face. RP 90-94, 126-129. Defendant knew where Officer Petersen was because he made eye contact with Officer Petersen and because he gestured to Officer Petersen. RP 90-94, 126-129. When Officer Petersen tried to pull behind defendant and shed more light on defendant's car, defendant threw his own car into reverse, nearly hitting Officer Petersen's car. RP 90-94, 126-129. If Officer Petersen had not sped out of the way, defendant would have run into his car door and could have hurt Officer Petersen. RP 92, 127.

Officer Petersen was performing his official duties at the time of the assault. Officer Petersen was driving a police cruiser that contained the markings "Lakewood Police" and "Sheriff's Department" when defendant attempted to ram him. RP 87, 123. Officer Petersen was also wearing a police officer's uniform with badge and patch. RP 122. He was on duty that evening and had activated his lights and sirens in an attempt to pull over defendant. RP 87-89, 122-124. He was following procedure when he decided to pull over defendant and when he tried to pull behind defendant in order to shed more light on defendant's vehicle. RP 88-90, 124-127.

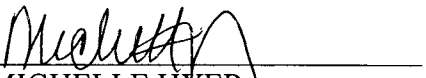
The jury had sufficient evidence to find defendant guilty of third degree assault. It had evidence that defendant attempted to inflict bodily injury on a law enforcement officer with unlawful force and that the law enforcement officer was performing his official duties at the time.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

DATED: February 8, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-9-07

Date Signature

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