

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 27318-1-III</b>
	)	<b>consolidated with</b>
<b>Respondent,</b>	)	<b>No. 27330-0-III</b>
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
<b>MICHAEL EDWARD CASTANER,</b>	)	<b>UNPUBLISHED OPINION</b>
	)	
<b>Appellant.</b>	)	
	)	

Kulik, J. — A jury found Michael Castaner guilty of possession of a stolen vehicle, attempt to elude a police vehicle, first degree malicious mischief, and second degree assault. At sentencing, the court considered each crime as a separate offense for the purpose of calculating Mr. Castaner’s offender score.

Mr. Castaner appeals, arguing that convictions for attempt to elude a police vehicle, first degree malicious mischief, and second degree assault constitute the same criminal conduct. Because each of the crimes involved a different victim, Mr. Castaner’s argument fails. The trial court did not abuse its discretion or misapply the law.

Therefore, we affirm the trial court.

## FACTS

On March 28, 2008, Officer Jay Kernkamp observed a sport utility vehicle (SUV) driven by Mr. Castaner that appeared to be speeding. Officer Kernkamp activated his emergency lights and attempted to catch up to the SUV. When the SUV accelerated, Officer Kernkamp activated his emergency siren, notified dispatch, and continued pursuit. Mr. Castaner did not stop.

Several police officers joined the pursuit. Officer Jeremy Daniel attempted PIT<sup>1</sup> maneuvers to stop the SUV, but they were unsuccessful. Mr. Castaner missed a sharp uphill turn, drove up an embankment, and came to a halt. Officer Craig Hamilton stopped his patrol car directly behind the SUV. The SUV spun its wheels attempting to go forward. Officer Hamilton testified that after the vehicle failed to go forward, Mr. Castaner looked back and made eye contact with Officer Hamilton. Mr. Castaner then “nailed it” in reverse and smashed into the front of Officer Hamilton’s patrol car. Report of Proceedings (RP) at 265. Officer Hamilton testified that his emergency lights were on and that he remained in his patrol car until the suspect’s vehicle stopped.

A jury convicted Mr. Castaner of possession of a stolen motor vehicle, attempt to

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<sup>1</sup> Pursuit immobilization technique.

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elude a police vehicle, first degree malicious mischief, and second degree assault. At sentencing, the court held that eluding, malicious mischief, and assault constituted separate instances of conduct, and, consequently, counted each charge separately in determining the offender score. This appeal followed.

### ANALYSIS

While a de novo standard of review seems more appropriate, we apply an abuse of discretion standard. *See State v. Tornngren*, 147 Wn. App. 556, 562, 196 P.3d 742 (2008). A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *State v. Lopez*, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007).

Under RCW 9.94A.589(1)(a), two or more current offenses are counted separately for determining the defendant’s offender score, unless the trial court finds that the current offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a) defines “same criminal conduct” as:

[T]wo or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

This statute is construed narrowly, resulting in most crimes not being considered the same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Under RCW 9.94A.589(1) and *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d

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1237, 749 P.2d 160 (1987), for multiple crimes to constitute the same criminal conduct, the following three elements must be shared in the crimes: First, the same objective criminal intent, which can be measured by whether one crime furthered another; second, the same time and place; and finally, the same victim. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). If any element is missing, then the multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately when calculating the offender score. *Id.*

Victimizing “‘more than one person clearly constitutes more serious conduct’ and, therefore, such crimes should be treated separately.” *Dunaway*, 109 Wn.2d at 215 (quoting David Boerner, Sentencing in Washington § 5.8(a) at 5-18 (1985)). *Dunaway* held that kidnapping and robbery convictions for two victims together did not encompass the same criminal intent, but that kidnapping and robbery convictions for each victim separately did encompass the same criminal conduct. *Id.* at 216-17. Treating crimes with different victims separately, resulting in a lengthier term of incarceration, will better protect the public by increasing deterrence for such crimes. *Id.* at 215.

The victim of second degree assault is the person the defendant assaults. *See* RCW 9A.36.021; *see also State v. Smith*, 124 Wn. App. 417, 432, 102 P.3d 158 (2004), *aff’d*, 159 Wn.2d 778, 154 P.3d 873 (2007). The instruction to the jury made clear that

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Officer Hamilton was the victim of the second degree assault:

To convict the defendant of the crime of Assault in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt.

One: That on or about the 28th day of March, 2008, *the defendant assaulted Officer Craig Hamilton with a deadly weapon.*

RP at 332 (emphasis added).

The victim of first degree malicious mischief is the owner of the property that was damaged. *See* RCW 9A.48.070. Here, the City of Spokane was the owner of Officer Hamilton's patrol vehicle. Thus, the City of Spokane was the victim of the first degree malicious mischief.

Mr. Castaner contends that "[l]aw enforcement officers in particular, as well as endangered civilians in general, are the victims of eluding." Appellant's Brief at 6. The State argues that the victim is the general public. We agree.

While no case or statute identifies the precise victim of attempt to elude a police vehicle, the court has held that the victim is the public for similar crimes. *Porter*, 133 Wn.2d at 181 (stating that the victim of an illegal drug sale is the public at large); *State v. Haddock*, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000) (stating that the victim of unlawful possession of a firearm is the public).

There was a different victim for each of the three crimes; thus, the defendant fails

to satisfy the third prong of the *Dunaway* test, and the crimes must be treated as separate for sentencing purposes. Because Mr. Castaner cannot meet the same victim prong of the test, we need not address the remaining two prongs—criminal intent and same time and place.

#### STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Castaner filed a pro se statement of additional grounds for review, raising ineffective assistance of counsel as an additional issue for review.

To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test: first, the defendant must show that the performance of counsel was so deficient that it fell below an objective standard of reasonableness, and second, that the deficient performance prejudiced the defendant. *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The failure to establish either prong of the test defeats the ineffective assistance of counsel claim. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). We engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption is only overcome by a clear showing of incompetence. *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

Mr. Castaner claims that his counsel made a misstatement in closing argument that was egregious enough to cause the jury to find him guilty of assault in the second degree.

In the passage Mr. Castaner references, his counsel stated:

So what did [the police] find [inside the stolen vehicle]? They found a receipt, a bill of bale [sic]. A bill of sale when asked about the car, but the officer said they didn't believe him because he doesn't know enough information about the person. I don't know anything about the person I bought the car from. He didn't know the date of birth. He didn't know his address. *He didn't know his phone number offhand immediately after this entire chase and beaten up by police.*

RP at 371 (emphasis added). Mr. Castaner contends that his counsel actually stated “immediately after this chase and being beaten up police.” Statement of Add'l Grounds, Ground 1. However, the record does not support Mr. Castaner's argument. Additionally, even if Mr. Castaner's counsel did leave out the word “by,” Mr. Castaner has not shown that it prejudiced him. The burden is on the defendant to show actual prejudice. *State v. Jury*, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978).

Mr. Castaner claims that his counsel was ineffective because he did not request a deposition of, or a hair follicle from, Mr. Stam, the owner of the stolen vehicle. Mr. Castaner has not articulated how a deposition of Mr. Stam or a hair follicle test from Mr. Stam would have resulted in a different outcome. Mr. Castaner has failed to show

deficient performance.

Mr. Castaner claims that his counsel failed to request documentation from the State of veterinarian bills, damages from the second degree assault, and damages to Officer Hamilton's police vehicle. The State did not claim any damages to the canine unit, so veterinarian bills would not have assisted in Mr. Castaner's defense. For second degree assault, no actual damage or injury is required.

Mr. Castaner also claims that his counsel failed to request documentation from the State for the damages to Officer Hamilton's patrol car. Malicious mischief, former RCW 9A.48.070(1)(a) (1983),<sup>2</sup> required that the damage exceed \$1,500. Mr. Castaner appears to argue that the damage might have been below the statutory requirement, and that his counsel failed to explore that avenue of defense. But Officer Hamilton testified that he estimated the costs of repair were \$2,600. Mr. Castaner has not shown that his counsel could have contested the officer's estimate if he had investigated the issue. Mr. Castaner has failed to show deficient performance. *See Jury*, 19 Wn. App. at 264.

Mr. Castaner also claims that his counsel failed to file a personal restraint petition under RAP 16. This claim is not relevant to the current appeal. There is no evidence in the record that Mr. Castaner asked to file a personal restraint petition. RCW 10.73.150.

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<sup>2</sup> The amount in former RCW 9A.48.070(1)(a) was recently raised to \$5,000. Laws of 2009, ch. 431, § 4 (effective July 26, 2009).



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And Mr. Castaner has one year from the mandate of this appeal to file a personal restraint petition. RCW 10.73.090.

Mr. Castaner fails to show that counsel's conduct resulted in prejudice to him.

Mr. Castaner's ineffective assistance claim is without merit.

We affirm the convictions and the calculation of the offender score.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Schultheis, C.J.

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Sweeney, J.