69707-2

69707-2

NO. 69707-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL PEREZ,

Appellant.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUL -5 PM 4:39

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

At Daniel Perez's trial, the State admitted testimonial statements from a nontestifying witness in violation of the confrontation clause. Even if the court correctly found these statements non-testimonial, they should not have been admitted under the narrow excited utterance exception to the hearsay prohibition. In addition, Mr. Perez's right to a fair trial was violated by the use of a to-convict instruction for a crime of which the jury was not actually asked to convict Mr. Perez. Each of these three errors requires reversal of the resulting conviction.

In the alternative, this Court should remand for the trial court to correct the judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The admission of out-of-court, testimonial statements from an unavailable witness violated Mr. Perez's constitutional right to confrontation where he had no prior opportunity to cross-examine the witness on the subject of the statements.

2. The trial court erred in finding David Hindal's statements non-testimonial.

3. The trial court erred in admitting out-of-court statements by David Hindal under the excited utterance exception to the requirement that hearsay be excluded.

4. The trial court erred in providing a to-convict jury instruction on an uncharged and unproved offense.

5. Over Mr. Perez's objection, the court erred in providing instruction number 10 (to-convict on murder in the second degree).

6. Instruction number 10 violated Mr. Perez's constitutional right to due process.

7. The presence of the assault conviction on the judgment and sentence violates the prohibition against double jeopardy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Washington and federal constitutions guarantee an accused the right to cross-examine witnesses against him. Where a witness is unavailable at trial, his prior testimonial statements cannot be used against the accused unless the accused has had a prior opportunity to cross-examine the witness regarding those statements. Statements made in response to police interrogation are testimonial if, objectively viewed, the statements were made not to resolve an ongoing exigency but to investigate or prosecute a potential crime. Did the trial court err

and violate Mr. Perez's right to confrontation by finding nontestimonial statements made by the alleged victim to law enforcement after any emergency had been resolved, the police and alleged victim were safe and secure, and the questioning and responses indicated a degree of formality, with the objective purpose being to solve a crime and not to resolve an emergency?

2. An out-of-court statement is generally inadmissible unless it fits within an exception to the hearsay rule. Excited utterances are admissible if the statement relates to a startling event or condition and is made while the declarant was under the stress of excitement caused by the event or condition. The proponent of the statement must show that the declarant made the statement while under the stress of excitement of the startling event or condition. Did the trial court abuse its discretion requiring reversal of the conviction by admitting the alleged victim's out-of-court statements under the excited utterance exception where the declarant had settled down, caught his breath, was cleared of any medical concern, and relayed an extensive narrative in response to police questioning?

3. Jury instructions must be manifestly apparent to the average juror and must not be misleading. An instruction that reduces the

State's burden of proof beyond a reasonable doubt violates due process. Did the trial court err and violate Mr. Perez's right to due process by providing the jury with a to-convict instruction on the uncharged and unproved offense of second degree murder?

4. The double jeopardy clause prohibits multiple punishments for the same offense. The concept of punishment includes collateral consequences resulting from the public presence of a conviction. Where a conviction was merged to comply with the prohibition against double jeopardy, should the judgment and sentence be remanded to exclude reference to the conviction?

D. STATEMENT OF THE CASE

1. August 14, 2009.

Robert Hindal and Daniel Perez were inmates at the Monroe Correctional Complex.[1] Vol. II Insert RP 41-42. Mr. Hindal served as a laundry porter for his prison unit. Vol. II Insert RP 41-43. On days he was on laundry duty, he spent extensive time in the laundry room off

[1] The verbatim report of proceedings is transcribed in separately paginated volumes referred to by volume number (e.g., "Vol. I RP") with the exception of an insert for the afternoon session on October 3, 2012, which is designated as "Vol. II Insert RP."

one of the two inmate dayrooms, dayroom two.[2] Vol. II Insert RP 41-43. On the morning of August 14, 2009, Mr. Hindal was on duty reading a book in the laundry room. Vol. II Insert RP 44-46, 62, 67-68; Vol. II RP 104-06. Mr. Perez was in the main area of the dayroom. Vol. II Insert RP 46-48, 68. At about 10:34, Mr. Perez entered the laundry room. Vol. II RP 89-90; Exhibit 3 at 10:34:47; Exhibit 4 at 10:34:48.[3] Less than six minutes later, he returned to the main dayroom area and proceeded to exit the dayroom to return to his cell.[4] Vol. II Insert RP 46-48; Exhibit 3 at 10:34:47 to 10:40:42.

About 30 seconds later, Mr. Hindal emerged from the laundry room, crossing his arms as he strutted around the dayroom with a string or cord-like-object around his neck and the television remote control in

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[2] The dayrooms are available for the inmates to watch television and play cards; the only inmate entrance and exit to the laundry room is through dayroom two. Vol. II Insert RP 36-37.

[3] Exhibits 3 and 4 are videos from the two cameras in dayroom two, which were collected on Sergeant Walters's orders while he interrogated Mr. Hindal. *See infra*; Vol. II RP 89-90, 95; *see* Vol. II RP 97-99 (only asked for twenty minutes of video to be reviewed; recognizing what video does not show). It is unclear from the evidence at trial whether the clock on the video reflects the accurate time of day. Vol. II RP 101-02, 107-08. The exhibits do not contain any audio. Instructions on viewing the exhibits can be found at CP 111. However, in counsel's experience, the exhibit will only fully function on some computers.

[4] The testifying officers referred to the prisoners' cells as "houses." Vol. II Insert RP 33-34. Mr. Perez's exit from the dayroom and movement back to his cell were appropriate actions in light of the ongoing "recall," whereby inmates move back to their cells for a unit-wide count. Vol. II Insert RP 38-40, 48, 53-54.

his right hand. Exhibit 4 at 10:41:21; Vol. II RP 5-6 (testimony of Monte Walker at excited utterance hearing); *see* Exhibit 4 at 10:44 to 45 (showing object in Hindal's hand was remote). A corrections officer in the adjacent security booth, Monte Walker, saw Mr. Hindal through a large window and thought Mr. Hindal could be attempting to alert him regarding a self-harm situation, which had been common in that prison unit, or some other type of emergency. Vol. II RP 6, 17; Vol. II Insert RP 34-35, 49-50.

In the context of the prison, officers respond to an emergency by securing the area immediately surrounding the emergency, providing staff and medical responders (a "response team"), determining what happened, and, if necessary, securing the larger facility or other persons. Vol. II RP 32-33, 43-48. Once these measures have been taken, an investigation commences if appropriate, where the officers gather evidence and secure the crime scene. Vol. II RP 48.

Following these procedures, an emergency was called, a lockdown of the unit was commenced, and all inmates were directed to return to their cells.[5] Vol. II RP 51-53, 131; Vol. II Insert RP 50, 87-

[5] Many inmates were already in their cells and the remainder were already on their way because the emergency arose during a ten-minute movement

88; Vol. III RP 64. Two other corrections officers, Officer James Misiano and Sergeant Derek Walters, entered the dayroom within a few minutes to find Mr. Hindal staggering with bloodshot eyes, red marks on his face, and a one- to two-foot-long bed sheet fragment draped around his neck. Vol. II RP 20-22, 39, 49-50; Vol. II Insert RP 66-70; Vol. II RP 91; Exhibit 4 at 10:42:26 to 10:43:00. The officers told Mr. Hindal to have a seat at one of the dayroom tables and asked him what had happened and what was wrong. Vol. II RP 31, 40, 57. They encouraged him to talk. Vol. II RP 32, 40; Vol. II Insert RP 88-89. Mr. Hindal calmed down and the video shows he sat down at the table almost immediately. Vol. II RP 40-41; Exhibit 4 at 10:42:26 to 10:42:42. Corrections officer James Misiano recalled Mr. Hindal stated, "Perez." Vol. II RP 22-23, 31. Sergeant Walters testified that Mr. Hindal "actually started getting his breath back and he was actually able to start talking" at this point; he had calmed down. Vol. II RP 57, 58; *see* Vol. II RP 22-23 (Misiano's testimony that it seemed Hindal was trying to get words out but was having trouble speaking). Officer Misiano only heard Mr. Hindal state "Perez." Vol. II RP 22-23, 31; Vol. II Insert RP 70, 80. Officer Misiano left the dayroom, followed

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prior to count referred to as "recall." Vol. II RP 51-52, 63-64; Vol. II Insert RP 38-40, 48, 53-54, 59-61, 72-73.

immediately by two other officers, and went to find Mr. Perez, who was in his cell as he should have been. Vol. II RP 23, 33-35; Vol. II Insert RP 51, 70-71; Exhibit 4 at 10:42:26 to 10:43:00.

Sergeant Walters testified Mr. Hindal made additional statements, "At first [Mr. Hindal] said he, 'He tried to kill me. He tried to kill me,' and when I asked who, he said 'Perez.' Then there was a lot of him just trying to catch his breath. Then he started talking about, 'Should have checked my pulse. Should have checked my pulse.'"[6] Vol. II RP 41; *accord* Vol. II RP 57-58. At least these final comments likely arose during the 30 seconds that Sergeant Walters was alone with Mr. Hindal in the dayroom, standing over him and pacing about. Exhibit 4 at 10:43:00 to 10:43:28.

Next, the response team, which totaled seven officials including medical personnel, assembled in the dayroom. Vol. II RP 31-32, 42-43, 72-73, 131-32; Vol. II Insert RP 50-51; Exhibit 4 at 10:43:28. The medical team assessed Mr. Hindal and found no concern for ongoing issues. Vol. II RP 69-70, 75, 134, 136, 139. The various personnel were gathered around Mr. Hindal at the table, interviewing him and collecting evidence. Exhibit 4 at 10:43:28 to 10:45:47 (while many

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[6] Sergeant Walters did not mention the statement "Should have checked my pulse" in his written report following the incident. Vol. II RP 59-60.

responders stand around the seated Hindal, some look into laundry room and at the fabric gathered from Hindal's neck).

At this time, the initial response to the medical emergency had ended and evidence-gathering began. Vol. II RP 48, 80. As Sergeant Walters testified in a pretrial hearing, "we were no longer dealing with a medical emergency; we were dealing with an assault. It kind of ups it. We've got evidence, we've got a crime scene, we've got video. There's a lot of stuff that goes into play with that." Vol. II RP 48. Sergeant Walters ensured a perimeter was secured to contain all inmates, the offenders were all secured in their cells, and an officer was dispatched to retrieve evidence in the form of video tapes from cameras in the dayroom. Vol. II RP 60-61. Sergeant Walters had removed the fabric from around Mr. Hindal's neck, which was admitted at trial as Exhibit 2, and moved it to an adjacent table. Vol. II RP 61; Vol. II Insert RP 90-92; Exhibit 3 at 10:42:49, 10:43:58; CP __ (Sub # 70 (exhibit list)).[7] He and the other responders interviewed Mr. Hindal, who had "settle[d] down." Vol. II RP 42, 47, 61-62; Exhibit 4 at 10:43:00 to 10:45:47. The video ends with the responders continuing to surround and question the seated Mr. Hindal. Exhibit 4 at 10:45:47.

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[7] A supplemental designation of clerk's papers has been filed with the superior court for documents designated herein by subfolder number.

In response to Sergeant Walters's questioning, Mr. Hindal relayed the following: He was reading a book while performing his laundry porter duties, when he was attacked from behind. It felt like a dream. Once, the rope went around his neck he tried to grab it so he could breathe. Then he was able to turn around and saw Mr. Perez. Mr. Hindal began hitting Mr. Perez. Vol. II RP 61-63 (Sergeant Walters's testimony at pretrial hearing); Vol. II RP 112-13. "And [Mr. Hindal] went into talking about how he – I don't know, he described something like – he was rambling on a lot of stuff, there was just a lot of stuff he was saying. But he described that he acted like he was dead and he [Perez] didn't check a pulse." Vol. II Insert RP 90. At the conclusion of this interview, Mr. Hindal was moved to dayroom one and asked to provide a written statement. Vol. II RP 92.

2. <u>Procedural posture.</u>

The State charged Mr. Perez with attempted murder in the second degree, RCW 9A.28.020 and RCW 9A.32.050(1)(a), and assault in the second degree by strangulation, RCW 9A.36.021(1)(g). CP 176.

Prior to trial, Mr. Hindal refused to testify and was held in contempt. Vol. I RP 93-100. Recognizing the court would likely find

him in contempt, Mr. Hindal testified pretrial that he would not answer questions about the events of August 14, 2009. Vol. I RP 72. In response to the prosecutor's question whether he would "just not . . . respond" to questions on the stand, Mr. Hindal elaborated, "Actually, I would ask the jury to acquit Mr. Perez. I would. I've got a letter that I was trying to get to you guys, but it obviously didn't work. So, I mean, do you really want me here?" Vol. I RP 72. The prosecutor pressed Mr. Hindal further asking, "You're saying he's not guilty?" Vol. I RP 73. To which Mr. Hindal responded,

> Yes, I'm saying that. Well, I'm saying he's not guilty as far as I'm concerned. I don't consider myself a victim. I mean, if I'm the alleged victim in this case and I say that there's no crime, I mean, the State can go forward with it, but I mean, isn't it kind of presumptuous for---[.]

Vol. I RP 73. The court interrupted the pretrial testimony to secure an attorney for Mr. Hindal. Vol. I RP 73. When the hearing continued, Mr. Hindal maintained that he would not testify and elaborated the basis for his refusal; he suffers from an obsessive-compulsive disorder that causes him to "feel that there's an entity [that no one can see] that stalks me and will actually bring harm to my family if I [testify]." Vol. I RP 76-83, 85-89. He then refused to answer questions about August 14, 2009. Vol. I RP 84-85.

Mr. Hindal's position did not change during the trial, and he was deemed unavailable to testify. Vol. I RP 103, 177-81; Vol. II Insert RP 30; Vol. III RP 1. Nonetheless, the trial court allowed the State to present Mr. Hindal's testimony through Sergeant Walters over Mr. Perez's confrontation and hearsay objections. CP 149, 170; Vol. I RP 30-42, 93-100, 112-13, 134. With regard to the confrontation clause, the trial court found Mr. Hindal's statements relaying details of the attempted strangling he had alleged Mr. Perez perpetrated were not the equivalent of testimony under the factors set forth in *State v. Koslowski*, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009) (to determine whether statements made in response to interrogation are testimonial, courts should look to (1) whether the speaker was discussing currents events as they were actually occurring or past events, (2) whether a reasonable listener would conclude the speaker was facing an ongoing emergency that required help, (3) the nature of what was asked and answered, and (4) the level of formality of the interrogation). Vol. II Insert RP 23-27. Finding there was no constitutional bar to admitting Mr. Hindal's untested statements, the trial court also found the full course of Mr. Hindal's statements prior to being moved to the second dayroom were admissible hearsay under the excited utterance exception, ER

803(a)(2). Vol. II Insert RP 18-23. The jury thus received Mr. Hindal's accusations without Mr. Perez having the opportunity to cross-examine the witness. After the State rested, Mr. Perez presented the jury with Mr. Hindal's pretrial testimony that he would acquit Mr. Perez and does not consider himself a victim. Vol. III RP 58-62 (exhibit 42 read to jury); Exhibit 42; *see* Vol. III RP 42 (State does not object to admission as substantive evidence).

The jury ultimately convicted Mr. Perez of attempted murder in the second degree and second degree assault, as charged. CP 112-13. At sentencing, the State conceded the assault offense merged into the attempted murder offense to avoid violating the prohibition against double jeopardy. CP 25-26; Vol. III RP 138-40. Consequently, Mr. Perez was sentenced for attempted murder in the second degree only, although the assault conviction is noted on the judgment and sentence. CP 14, 15.

E. ARGUMENT

1. **The admission of testimonial statements from an unavailable witness violated Mr. Perez's constitutional right to confront the witnesses against him.**

a. Testimonial statements from an unavailable witness that were not previously subject to cross-examination must be excluded to preserve an accused's constitutional right to confront the witnesses against him.

The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right guarantees the defendant a "face-to-face" meeting with witnesses against him and ensures an opportunity for cross-examination. *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988); *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L.Ed.2d 631 (1987).

In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause guarantees a defendant's right to confront those "who 'bear testimony'" against him. 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). Under *Crawford*, an absent witness's testimonial statements are admissible

only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine him. *Id.* at 59. The *Crawford* Court provided examples of a "core class" of testimonial statements, including "statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52.

"[S]tatements taken by police officers during interrogations are testimonial." *Koslowski*, 166 Wn.2d at 417 (citing *Crawford*, 541 U.S. at 52). In this context, the colloquial meaning of interrogation is intended. *Crawford*, 541 U.S. at 53 n.3. In *Crawford*, the Court found a recorded statement, knowingly given in response to structured police questioning undoubtedly fell within the class of statements protected by the Sixth Amendment. *Id.*; *see id.* at 53 ("interrogations by law enforcement officers fall squarely within th[e] class" of statements to which the Confrontation Clause applies). If statements are made in response to police questioning "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" the statements are

generally nontestimonial. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). However, such statements to police are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

"[T]he existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation." *State v. Reed*, 168 Wn. App. 553, 563, 278 P.3d 203 (2012) (quoting *Michigan v. Bryant*, __ U.S. __, 131 S. Ct. 1143, 1157, 179 L. Ed. 2d 93 (2011)). "[W]here the statements are neither a cry for help nor provision of information that will enable officers immediately to end a threatening situation, it is immaterial that the statements were given at an alleged crime scene and were 'initial inquiries.'" *Koslowski*, 166 Wn.2d at 421 (quoting *Davis*, 547 U.S. at 832).

Four factors are evaluated to help determine whether the primary purpose of police questioning is to enable police assistance to meet an ongoing emergency or to prove past events:

> (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance,

> or was he or she describing past events? The amount of time that has elapsed (if any) is relevant.
>
> (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency.
>
> (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial.
>
> (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (adopting test from and citing *Davis*, 547 U.S. at 827) (footnote omitted). The focus of the inquiry is an objective analysis. *Bryant*, 131 S. Ct. at 1156. Within a single conversation, the focus may change such that initial nontestimonial statements made to aid an ongoing emergency may lead to testimonial responses to questioning used to establish or prove past events. *Id.* at 419 (citing *Davis*, 547 U.S. at 828).

This Court reviews de novo whether the confrontation clause was violated by the admission of testimony. *Koslowski*, 166 Wn.2d at 417. The State bears the burden of establishing the admitted testimony was nontestimonial. *Id.* at 417 n.3.

b. David Hindal's statements to officers recounting the details of the incident after any exigency was resolved were testimonial.

It is undisputed that Mr. Hindal was unavailable for trial. Additionally, Mr. Perez had no prior opportunity to cross-examine Mr. Hindal as to the statements the State sought to admit. Consequently, the question before this Court is whether the statements Mr. Hindal made to Sergeant Walters and the response team in dayroom two are testimonial. Evaluation of the four factors set forth in *Davis* and *Koslowski* demonstrate Mr. Hindal's extensive recounting of the alleged crime to the officers after any emergency had ended constituted testimonial statements. Introduction of the statements at trial caused Mr. Hindal to be a witness within the meaning of the confrontation clause. *See Davis*, 547 U.S. at 821.

The first factor evaluates whether the speaker was speaking about past events or events as they are actually occurring and requiring emergent police assistance. In *Koslowski*, the speaker was describing

events that had already occurred, nothing in her statements indicated the robbers might return, the robbery had been completed, and the robbers had left the scene of the crime despite the short amount of time that had elapsed since the emergent situation she was reporting. 166 Wn.2d at 422. The fact that the robbers were still at large did not alter that analysis. *See id.* at 422, 424. Put simply, the speaker in *Koslowski* was describing past events. *Id.* at 422.

The same is true here. The trial court found the "events were not occurring [at the time Mr. Hindal made the statements] but very little time had elapsed." Vol. II Insert RP 23. Nonetheless, as in *Koslowski*, the determinative factor is that the alleged crime had been completed and Mr. Hindal was not at continuing risk. Mr. Perez, the alleged perpetrator, was physically separated from Mr. Hindal and the responding officers; he was contained in his cell in a secure prison facility on lockdown. This stands in stark contrast to scenarios like *Reed*. In that case the first factor tended to indicate the statements were nontestimonial because the speaker called 9-1-1 indicating the perpetrator was threatening her at that moment, had assaulted her within minutes of placing the call, and the conversation focused on the speaker's location in order to provide assistance for an ongoing

emergency. *Reed*, 168 Wn. App. at 565-66. In this case, the emergency had ended. This factor cuts in favor of Mr. Hindal's statements being testimonial.

The second factor, whether a reasonable listener would conclude the speaker was facing an ongoing emergency requiring assistance, also weighs in favor of a finding of testimoniality. An ongoing emergency may be deemed to exist where the crime is still in progress or the victim or officer is in danger due to the need for medical assistance or because the alleged perpetrator poses a continuing threat. *Koslowski*, 166 Wn.2d at 419 n.7. A witness's level of distress is generally irrelevant to this evaluation. *Id.* at 424. In *Koslowski*, this factor cut in favor of the statements being testimonial because the robbers had left, the police had arrived, and nothing in the record indicated any reason to think the speaker faced any further threat. *Id.* at 423-24.

Like in *Koslowski*, here a reasonable listener would conclude the danger had passed. *Id.* (citing *State v. Kirby*, 908 A.2d 506, 524 (Conn. 2006); *People v. Trevizo*, 181 P.3d 375, 379 (Colo. App. 2008)). Mr. Perez was physically separated from Mr. Hindal; he was under the control of prison officials; and physical barriers and a cadre of prison officials and security devices separated Mr. Perez from Mr.

Hindal and the responding officers. *See State v. Ohlson*, 162 Wn.2d 1, 15, 168 P.3d 1273 (2007) (distilling *Davis*, 547 U.S. at 830, to the pertinent question of whether the perpetrator poses an active threat of harm at the time of the interrogation). It was evident from the moment the officers entered the dayroom that Mr. Hindal was alone in the secured room. *See* Exhibit 4 at 10:42:26; Exhibit 3 at 10:42:36. There was no bona fide physical threat as was present in *Davis*. *Davis*, 547 U.S. at 817-18, 827 (speaker called 9-1-1 declaring, "He's here jumpin' on me again. . . . He's usin' his fists.").

The trial court erroneously found this second factor weighed in favor of the statements being nontestimonial. Vol. II Insert RP 24-26. The court found that, while in hindsight there may have been no continuing emergency, the lack of emergency was not clear to the individuals on the ground at the time. *Id.* However, this factor (as with the entire test) focuses on the objective circumstances and a reasonable listener. *Bryant*, 131 S. Ct. at 1156. It is plain from the fact that Mr. Hindal was the only inmate among initially four officers and, later, eight officers and other responders while the rest of the unit was on lockdown and being secured by fellow officers, that there was no

continuing, imminent threat to Mr. Hindal. This second factor indicates the statements were testimonial.

The third factor evaluates what was asked and answered to determine under an objective standard whether the interrogation was necessary to resolve a present emergency or to learn what happened in the past. *Koslowski*, 166 Wn.2d at 425. "[I]nitial inquiries at the scene of the crime might yield nontestimonial statements when officers need to determine with whom they are dealing in order to assess the situation and the threat to the safety of the victim and themselves." *Id.* at 425-26. Mr. Hindal's initial statement identifying Mr. Perez can be fairly characterized as nontestimonial under this rubric. Although the statement was not "a cry for help in the face of an ongoing emergency," it did "provide[] information that would enable officers immediately to end a threatening situation." *Id.* at 426. In the context of the prison, where hundreds are confined securely, identification and isolation of the alleged perpetrator resolves any remaining emergency. *See* Vol. II RP 32-33, 43-48, 80 (describing stages of response).

Accordingly, after Mr. Perez was implicated as the perpetrator and Officer Misiano secured him, there was no longer any ongoing emergency to be resolved. The alleged crime was complete, and

neither the alleged victim nor the police were in danger. *See Koslowski*, 166 Wn.2d at 428 (interrogation related to past events, not ongoing emergency, where no evidence indicated declarant, officers, any onlooker or potential witness was in danger); *cf. Williams v. Illinois*, __ U.S. __, 132 S. Ct. 2221, 2243, 183 L. Ed. 2d 89 (2012) (plurality opinion) (whether statement is testimonial turns in part on whether suspect has been identified at time made and is being accused by it); *id.* at 2250-51 (Breyer, J. concurring) (same). Sergeant Walters testified he was "dealing with an investigation situation into what happened" at this point. Vol. II RP 63. Mr. Hindal's retelling of the incident bore no significance to the medical responders. Vol. II RP 80. And Mr. Hindal's responses started with his duties as a laundry porter. Vol. II RP 61-63. Viewed objectively, the officers' questions and Mr. Hindal's responses related past events for purposes of investigation and prosecution of a suspected crime.

The final factor looks to the level of formality of the questioning. In *Davis*, the Court found that formality can be indicated where the witness is isolated during the interrogation. *Davis*, 547 U.S. at 830, 832. A written statement also indicates formality. *Id.* To the contrary, a conversation with a casual acquaintance is generally

informal. *State v. Beadle*, 173 Wn.2d 97, 110, 265 P.3d 863 (2011). Mr. Hindal was isolated in a room, safe from any outside threat or interruption. *See Reed*, 168 Wn. App. at 564, 566. The video clearly shows that four officers entered the dayroom and immediately commanded Mr. Hindal to be seated. Exhibit 3 at 10:42:36 to 10:42:42. Indeed, Mr. Hindal followed their directions and was seated within six seconds. *Id.* Three of the officers quickly left, but Sergeant Walters loomed over Mr. Hindal, pacing and shifting his weight while interrogating Mr. Hindal. Exhibit 4 at 10:43:00 to 10:43:28. Seven other responders then entered the dayroom and the group surrounded Mr. Hindal apparently asking various questions and culling or discussing evidence. Exhibit 4 at 10:43:28 to 10:45:47; Exhibit 3 at 10:43:29 to 10:45:48. This interrogation was unlike a conversation with a casual acquaintance. *Beadle*, 173 Wn.2d at 110.

The trial court improperly considered the interrogation to be informal. Vol. II Insert RP 26-27. In so finding, the trial court appears to have considered only the initial comments Mr. Hindal made. *Id.* The court ruled, "Really initially they're just like, what's happened to you, in response to seeing his injuries. We're not at a situation where one interrogation person is sitting down asking for an ongoing story."

Id. While that may be a fair analysis of the initial exchange between Mr. Hindal and the officers, where he purportedly stated "Perez, Perez" and, according to Sergeant Walters, also that Perez tried to kill him, the opposite is true of the remainder of the interrogation. After these initial statements, Mr. Hindal was seated and settled down. Vol. II RP 40, 42-43. In fact, the video exhibits demonstrate Mr. Hindal was seated within moments of the officers entering the dayroom. Exhibit 3 at 10:42:36; Exhibit 4 at 10:42:30. Mr. Hindal then responded to Sergeant Walters's, and the other responders', questions with a lengthy narrative that began with his duties as a laundry porter and concluded with Sergeant Walters moving Mr. Hindal to another room to commit his narrative to written form. Vol. II RP 61-63, 92, 112-13; Vol. II Insert RP 90. Contrary to the court's finding, this was not an informal discussion by a 9-1-1 operator securing details for an ongoing emergency; it was not a conversation among friends. It was a testimonial narrative in response to the Sergeant's investigation. Accordingly, this factor also weighs in favor of concluding Mr. Hindal's statements were testimonial.

In *Koslowksi*, our Supreme Court evaluated the four factors and held the statements testimonial. 166 Wn.2d at 421-22, 490. As in

Koslowski, the primary purpose of the interrogation of Mr. Hindal was to investigate past events, not to resolve an ongoing emergency. Mr. Hindal's statements accordingly were testimonial and their admission violated Mr. Perez's right to confrontation.

c. The State already conceded the admission was not harmless beyond a reasonable doubt; the conviction should be reversed.

Where evidence is admitted in violation of the Confrontation Clause, reversal is required unless the State can show the error is harmless. *Koslowski*, 166 Wn.2d at 431; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). In other words, the State must show that the admission of Mr. Hindal's statements did not contribute to the conviction. *Chapman*, 386 U.S. at 26.

Although the State admitted video of the dayroom, no witness or evidence attested to what occurred during the nearly six minutes that Mr. Perez and Mr. Hindal were in the laundry room or the following 35 seconds before Mr. Hindal entered the dayroom with the television remote in his hand. And the video did not show Mr. Perez or Mr. Hindal entering the dayroom, or any possible interactions between them prior to the start of the extracted video. Vol. II RP 97-99. Moreover, the jury was aware Mr. Hindal required no medical

treatment, and that by alleging Mr. Perez assaulted him, Mr. Hindal received valium and was segregated from Mr. Perez. Vol. II RP 108-10, 139-44. The evidence further showed that if Mr. Hindal had harmed himself, instead of the other-inflicted injury he alleged, he would have been subject to repercussions. Vol. II RP 108-10.

Thus it is not surprising that the State conceded Mr. Hindal was a necessary witness; absent his testimony, the State could not have secured a conviction. Vol. I RP 95-96. The prosecutor argued before trial,

> I never said it was not necessary for [Mr. Hindal] to testify. . . . I will say that I may be able to get the case to the jury based on the video and the officer's testimony that the Defendant was the only one in the dayroom at the time it occurred, but the prosecutor that starts fooling around like that may be headed for an unpleasant surprise. So I really feel that he is a necessary witness on this case. I think the other [proceeding without Mr. Hindal's testimony] is a real gamble.

Vol. I RP 95-96.

Absent Mr. Hindal's statements, reasonable doubt certainly existed regarding what transpired, Mr. Perez's intent, if any, and alternative explanations for the scant other evidence the State presented. For example, the officers' testimony regarding the timing of their response and its relation to the prison schedule differed from the

timestamp on the video. Vol. II RP 107-08. Moreover, Mr. Perez offered motivation for Mr. Hindal to fabricate the accusations—if Mr. Hindal had inflicted self-harm, he would have been subject to repercussions. By accusing Mr. Perez of assault, Mr. Hindal not only escaped those repercussions but was also automatically segregated from Mr. Perez. Vol. II RP 108-10. Additionally, officers Misiano and Walters could not agree on what Mr. Hindal said when they first entered the dayroom. *Compare* Vol. II RP 110-11 *with* Vol. II Insert RP 70 (Walters testifies Misiano present when Hindal said Perez tried to kill him; Misiano only aware of Hindal saying "Perez" without statement as to intent or attempt). Consequently, as the State itself discussed, admission of Mr. Hindal's testimonial statements was not harmless to the verdict beyond a reasonable doubt.

Because Mr. Perez was denied the opportunity to "test his accuser's assertions 'in the crucible of cross-examination" and the admitted testimony was not harmless, the resulting conviction should be reversed. *State v. Doerflinger*, 170 Wn. App. 650, 655, 285 P.3d 217 (2012) (quoting *Crawford*, 541 U.S. at 61).

2. **Even if the statements were nontestimonial, the trial court abused its discretion in admitting them under the excited utterance exception to the hearsay rule.**

   a. Mr. Hindal's statements do not fall within the limited exception to the prohibition against admitting hearsay for excited utterance.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802. One narrow exception is for an excited utterance. ER 803(a)(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* The proponent of hearsay under this exception must satisfy three closely-connected requirements: "that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007) (citation omitted).

The underlying rationale behind admitting this hearsay evidence is that "under certain external circumstances of physical shock, a stress

of nervous excitement may be produced which stills the reflective faculties and removes their control." *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence § 1747 (1976)). "[T]he key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995) (quoting *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)).

In determining whether a statement is an excited utterance, spontaneity is crucial. *State v. Briscoeray*, 95 Wn. App. 167, 173, 974 P.2d 912, *review denied*, 139 Wn.2d 1011(1999). In determining spontaneity, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it. *Chapin*, 118 Wn.2d at 688. Where the witness had an opportunity to reflect on the event and fabricate a story, the statement is not spontaneous and thus not an excited utterance. *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000).

Another factor to consider is whether prior to making the statement, the declarant was calm, as in this circumstance there is an increased danger of fabrication. *Chapin*, 118 Wn.2d at 689. An additional factor to be considered is whether the statement was made in response to a question, as this "raises doubts as to whether the statement was truly a spontaneous and trustworthy response to a startling external event." *Id.* at 690.

The decision whether to admit an out-of-court statement as an excited utterance is reviewed for an abuse of discretion. *Young*, 160 Wn.2d at 806. To admit the evidence, the trial court must find by a preponderance of the evidence that the declarant remained continuously under the influence of the event at the time the statement was made. ER 104(a); *State v. Ramires*, 109 Wn. App. 749, 757, 37 P.3d 343 (2002). ER 803(a)(2) must be interpreted in a restrictive manner, so as to "not lose sight of the basic elements that distinguish excited utterances from other hearsay statements. This is necessary . . . to preserve the purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present." *State v. Dixon,* 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

Here, the trial court abused its discretion in finding all of Mr. Hindal's statements admissible under the limited excited utterance exception. First, Mr. Hindal was seated and calm within six seconds of the officers' entry into the dayroom. Accordingly, only what Mr. Hindal may have uttered during those initial six seconds might have occurred while he was still under the influence of the alleged startling event. But further review demonstrates even any utterance during those six seconds may not have been excited under ER 803(a)(2). The evidence does not show when within the six minutes that Mr. Perez was in the laundry area the alleged startling event actually occurred. Assuming it occurred, maybe it occurred at the beginning followed by a conversation. Moreover, more than a minute passed between the time Mr. Hindal emerged from the laundry area and the officers' entry into the dayroom. Mr. Hindal clearly had enough time for fabrication. Indeed, he subsequently engaged in a lengthy discourse with the various members of the response team during which he recounted his labor duties right through to details of the alleged event.

Viewed restrictively, as the exception must be, Mr. Hindal's lengthy narrative to the responding officers and medical staff were not excited utterances.

b. The error requires reversal.

Evidentiary errors by the trial court are reviewed under the non-constitutional harmless error standard. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997) (nonconstitutional error in admitting evidence does not require reversal absent reasonable probability it affected the verdict). Under this standard an error cannot be harmless where, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Id.*

The State all but conceded that the result would be different if Mr. Hindal's statements had been excluded. Vol. I RP 95. Without Mr. Hindal's statements, the State's case came down to the video from the dayroom (Exhibits 3 and 4) and the officer's testimony that Mr. Perez was the only inmate in the dayroom at the time of the alleged incident. The outcome of the trial was materially affected by the jury's receipt of Mr. Hindal's own words to the officers that Mr. Perez had strangled him. To this effect, the prosecutor stated,

> I never meant to suggest that I could proceed to trial without Mr. Hindal being a witness in the case. . . . I will say that I may be able to get the case to the jury based on the video and the officer's testimony that the Defendant was the only one in the dayroom at the time it occurred, but the prosecutor that starts fooling around like that may be headed for an unpleasant surprise.

Vol. I RP 95. As set forth further above, it is reasonably probable that without Mr. Hindal's statements, the outcome would have been different. Consequently, the error was not harmless and Mr. Perez's conviction should be reversed.

3. **Where Mr. Perez was not charged with second-degree murder, it was error to provide the jury with a to-convict instruction regarding that offense.**

The State's proposed jury instructions properly included a to-convict instruction on attempted murder in the second degree and assault in the second degree. CP __ (Sub #58). The attempted murder instruction listed the elements as a substantial step towards murder in the second degree and intent to commit murder in the second degree. *Id.* Rather than define the elements of second degree murder in a separate instruction, the State proposed a separate to-convict instruction for murder in the second degree, although Mr. Perez was, of course, not charged this completed act. *Id.* This to-convict instruction resembled the instructions on the charged counts; it included language regarding proof of each element beyond a reasonable doubt and the duties to return a guilty or not guilty verdict. *Id.*

Mr. Perez objected to the additional to-convict instruction, arguing the elements of second degree murder should simply be listed

in a separate definitional instruction and not presented through an independent to-convict instruction. Vol. III RP 33-35. Mr. Perez also presented such pure elements instruction. CP 138 (citing WPIC 27.02); Vol. III RP 43-46, 69-70.

The court overruled Mr. Perez's objection, rejected his proposed instruction, and provided the jury with the State's proposed to-convict instruction on second degree murder. CP 126; Vol. III RP 45-46. Obviously confused, the jury asked "Can we have the definition of murder in the second degree?" CP 133. The court referred the jury back to the to-convict instruction. *Id.*

An alleged error in jury instructions is reviewed de novo. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

Jury instructions are erroneous if they mislead the jury. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Jury instructions "must more than adequately convey the law." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Rather, the instructions must make the applicable legal standard "'manifestly apparent to the average juror.'" *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

Furthermore, "it is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it." *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). The jury should presume each instruction has meaning. *State v. Hutchinson*, 135 Wn.2d 863, 884, 959 P.2d 1061 (1998).

The provision of a to-convict instruction for the uncharged and unproved offense of second degree murder was prejudicial error. Generally, "[i]f the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime." *State v. DeRyke*, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003) (quoting WPIC 100.02 Note on Use). An elements instruction delineating the elements of the attempted offense is not the equivalent of a to-convict instruction. A to-convict instruction, like the one provided here, contains not only the elements of the offense but also language instructing the jury that "each of the following elements of the crime must be proved beyond a reasonable doubt" and

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

CP 126; WPIC 4.21. Here, the proper result would have been for the jury not to have followed that language. Nonetheless, it was included in instruction 10. *Cf. Hutchinson*, 135 Wn.2d at 884 (jury to presume each instruction has meaning).

In fact, the court was not asking the jury to determine whether the State had proved second degree murder beyond a reasonable doubt. The only purpose of the instruction should have been to inform the jury of the elements of second degree murder so it could find whether attempted second degree murder had been proved. A proper instruction, such as that proposed by Mr. Perez, would have done that, and that alone. To be clear, the fact that the instruction provided here also contains the elements of second degree murder does not render it proper. For example, in *Allery*, the court disapproved a jury instruction that adequately conveyed the reasonableness standard for self-defense but, by omitting a direction to consider all surrounding circumstances, failed to make that standard manifestly clear. 101 Wn.2d at 593, 595. Here, too, the Court must look beyond the appropriate portions of instruction 10. The to-convict language in instruction 10 was erroneous. Because there was not substantial evidence Mr. Perez committed second degree murder—that is, the alleged victim did not

die—the court committed prejudicial error by providing the jury with a to-convict instruction for the offense. *See Hughes*, 106 Wn.2d at 191.

The error was compounded when, in response to the jury's question, the trial court referred the jurors back to the instructions already given rather than clarifying the limited relevance of murder in the second degree. After a jury begins deliberations, a trial court has the discretion to decide whether to provide additional instructions to the jury and no duty to provide additional instructions if the instructions given accurately state the law. *State v. Ng*, 110 Wn.2d 32, 42-43, 750 P.2d 632 (1988). "However, where a jury's question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction." *State v. Campbell*, 163 Wn. App. 394, 402, 260 P.3d 235 (2011) (citing *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). Thus, if the error was not apparent when Mr. Perez raised it, objecting to the provision of the to-convict instruction on second-degree murder, the deficiency should have been made clear to the court by the jury's question. *See id.*

The jury's inquiry renders it beyond dispute that the instructions as given did not make it manifestly apparent that the murder to-convict

instruction was to merely serve as a definitional instruction while the other two to-convict instructions actually meant what instructed. CP 133. The jury asked the court for the definition of murder in the second degree. *Id.* Clearly what the court thought it was providing to the jury was indeed not apparent.

Moreover, by providing an extraneous to-convict instruction, the court diluted the value of the to-convict instructions on the crimes charged. The instruction reduced the State's burden of proof. *See* U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The language in instruction 10, while extraneous and misleading in an instruction on an uncharged count, is essential to a fair trial on the charged offenses. That language assures the jury only convicts if each element has been proved by the State beyond a reasonable doubt. It informs the jury that if such proof has been satisfied, it has a duty to return a guilty verdict. Contrarily, if the jury has a reasonable doubt, it has a duty to return a verdict of not guilty. This language is essential in an actual to-convict instruction, yet the trial court intended for the jury to ignore the very same language in instruction 10. If the jury was to ignore the introductory and conclusory language in the second degree murder to-convict

instruction, how can the jury be presumed to have followed it in the other to-convict instructions?

For the reasons set forth above, the State cannot show the instructional error was harmless beyond a reasonable doubt. Section E.1.c and E.2.b, *supra*. Consequently, Mr. Perez's conviction should be reversed and remanded for a new trial on this independent basis.

4. **The merged assault count should be vacated and the judgment and sentence should be cleansed of all reference to it.**

The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V; *see* U.S. Const. amend. XIV.[8] Similarly, article I, section 9 of our state constitution states, "No person shall be … twice put in jeopardy for the same offense." Const. art. I, § 9. Washington gives its constitutional provision against double jeopardy the same interpretation that the United States Supreme Court gives to the Fifth Amendment. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

[8] The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

The double jeopardy clause protects against multiple punishments for the same offense. *E.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). "The term 'punishment' encompasses more than just a defendant's sentence for purposes of double jeopardy." *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). Even without an accompanying sentence, a conviction alone can constitute punishment. *Id.* at 454-55. Adverse collateral consequences can arise from a mere conviction including delaying eligibility for parole, enhancing a sentence for a future conviction under a recidivist statute or use as impeachment of the defendant's credibility. *Id.* at 454-55, 465 (citing *Ball v. United States*, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)). A conviction also carries a social stigma regardless of any punishment imposed. *Id.* Accordingly, reducing a lesser conviction to judgment or referencing that conviction in the judgment constitutes punishment and violates double jeopardy. *See id.* at 464-65.

"To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to

the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing." *Turner*, 169 Wn.2d at 464-65. Here, the State conceded at sentencing that the assault conviction violated double jeopardy and merged with the attempted murder conviction. CP 25-26; Vol. III RP 138, 141. The court agreed, but the judgment and sentence reflects the assault conviction, albeit with a line through it and a handwritten notation stating "merged." CP 14-15.

If this Court otherwise affirms Mr. Perez's conviction for attempted murder, the judgment and sentence should be remanded with directions to enter a corrected judgment and sentence that removes all reference to the vacated assault conviction. *See Turner*, 169 Wn.2d at 466.

F. CONCLUSION

Reviewing de novo and objectively the circumstances of the alleged victim's lengthy statements in response to official questioning, this Court should hold the admission violated Daniel Perez's constitutional right to confront witnesses. The error requires reversal of the conviction. The admission of the same statements under the excited utterance exception to the hearsay prohibition is a separately sufficient

ground to reverse. Finally, the conviction should be reversed because providing a to-convict instruction on an uncharged and unproved act was prejudicial error.

In the alternative, the judgment and sentence should be remanded to remove reference to the vacated assault conviction.

DATED this 3rd day of July, 2013.

Respectfully submitted,

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69707-2-I
	)	
	)	
DANIEL PEREZ,	)	
	)	
Appellant.	)	

<u>DECLARATION OF DOCUMENT FILING AND SERVICE</u>

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **<u>OPENING BRIEF OF APPELLANT</u>** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________
[X]	DANIEL PEREZ 888274 MCC-SOU PO BOX 514 MONROE, WA 98272-0514	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON, THIS 5TH DAY OF JULY, 2013.

X

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