

NO. 66658-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HECTOR VETETA-CONTRERAS and
PEDRO JOSE MARTINEZ,

Appellants.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED¹

1. Whether the amended information included all the essential elements of the crime of felony harassment.
2. Whether the trial court properly admitted defendant Pedro Martinez's statements to the police.
 - a. Whether this Court should decline to consider Martinez's new argument challenging the admission of his statements to the police.
 - b. Whether the police were not required to provide Miranda² warnings during a Terry³ stop.
 - c. Whether any error in admitting Martinez's statements to the police was harmless.
3. Whether the defendants have failed to show that the trial court erred in admitting the immunity agreements between the State and Martin Monetti.
 - a. Whether the defendants may not challenge the admission of the immunity agreements on appeal when they

¹ On appeal, defendants Veteta-Contreras and Martinez raise some identical issues and some unique issues. The State addresses each issue in the order in which it arose during the case.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

³ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

stated that they had no objection to admission at trial and encouraged the jury to review them.

b. Whether any error in admitting the immunity agreements was harmless.

c. Whether defendant Hector Veteta-Contreras has waived his claim that the prosecutor committed misconduct by offering the immunity agreements, given that he made no objection at trial.

d. Whether Veteta-Contreras has failed to show that he received ineffective assistance of counsel based upon his attorney's strategic decision to not object to the admission of the immunity agreements.

4. Whether the trial court properly allowed a witness to testify that he recognized some of Martinez's tattoos.

a. Whether the constitutional standards governing the identification of persons do not apply to the identification of tattoos.

b. Whether any error in admitting testimony about Martinez's tattoos was harmless.

5. Whether the defendants have failed to establish that the "to convict" instruction for first-degree robbery contained an uncharged alternative means.

a. Whether the invited error doctrine bars the defendants from challenging the "to convict" jury instruction that they joined in proposing.

b. Whether the first-degree robbery statute contains alternative means within alternative means.

6. Whether Veteta-Contreras has failed to establish that he received ineffective assistance of counsel due to the inclusion of an uncharged alternative means in the definitional instruction for robbery.

7. Whether the trial court properly declined to instruct the jury with the proposed inferior degree instructions.

a. Whether the defendants may not make new arguments on appeal supporting the inferior degree instructions.

b. Whether Martinez has failed to establish that the well-settled test for determining whether to instruct on an inferior degree offense is unconstitutional.

8. Whether sufficient evidence supports Martinez's conviction for first-degree robbery.

9. Whether Martinez has failed to establish that the prosecutor committed misconduct in rebuttal argument.

10. Whether double jeopardy does not prohibit Veteta-Contreras's convictions for attempted first-degree robbery and second degree assault.

B. STATEMENT OF THE CASE

Late at night, in the parking lot of a nightclub, defendants Pedro Martinez and Hector Veteta-Contreras met a group of three men, including Martin Monetti. Veteta-Contreras and Martinez bragged about their affiliation with a Salvadoran street gang and showed off their weapons, a gun and a machete.

Veteta-Contreras and Martinez, with Monetti and another man following, approached Walter Flores-Cruz and his girlfriend. After Veteta-Contreras and Martinez demanded money and Veteta-Contreras displayed his machete, Flores-Cruz gave them forty dollars.

The group of men then approached Eliezer Duran-Acosta, who was with several friends. Again, Martinez and Veteta-

Contreras demanded money. Though Martinez flashed his gun and Veteta-Contreras pulled out his machete, Duran-Acosta refused. When Duran-Acosta turned to leave, Veteta-Contreras swung the machete, cutting the back of Duran-Acosta's shirt and leaving a bruise. A security guard from the nightclub intervened, and the men walked away.

After the police arrived, Flores-Cruz led them to Martinez, identifying him as one of the robbers. A short time later, Duran-Acosta also identified Martinez as one of the men who had attempted to rob him. Around that same time, the police also detained Veteta-Contreras and Monetti. Duran-Acosta positively identified Veteta-Contreras as the man with the machete and confirmed that Monetti had been present but not an active participant in the attempted robbery.

A few months later, several more witnesses identified Martinez in a lineup as the man with the gun, and picked Veteta-Contreras in a photo montage as the man with the machete.

Martinez and Veteta-Contreras were charged with first-degree robbery, attempted first-degree robbery and felony harassment, and Veteta-Contreras was charged with an additional

count of second-degree assault. At trial, their defense was identity. The jury convicted both defendants as charged

1. THE ROBBERY OF FLORES-CRUZ.

On Friday nights, the China Harbor Restaurant in Seattle turns into a Latin music nightclub. RP 527-28.⁴ On the night of April 16, 2010, Robin Barrera, Denis Garcia and Martin Monetti went to the China Harbor Restaurant together. RP 816-20, 906-07, 1013-15. While in the restaurant's parking lot, they met Pedro Martinez and Hector Veteta-Contreras. RP 821-34, 909-22, 1015-35. Veteta-Contreras and Martinez told the three men that they were from El Salvador, flashed gang signs, and identified themselves as members of a Salvadoran street gang, Mara

⁴ The report of proceedings, ordered by Martinez, consists of 11 volumes. Nine volumes are consecutively paginated and consist of the trial testimony and closing argument. These are referred to as "RP." A transcript containing some pretrial motions (on July 13, 2010 and September 28, 2010) and opening statements on December 9, 2010 is referred to as "RP(opening)." The transcript for the sentencing hearing on February 4, 2011 is referred to as "RP (sentencing)." In addition to these volumes, Veteta-Contreras arranged for a transcript dated October 22, 2010. The trial transcripts in Veteta-Contreras's appeal are not all consecutively paginated, though it was prepared by the same court reporter. Accordingly, the State's citations are to the transcripts filed in Martinez's appeal. With respect to the clerk's papers, CP(M) refers to the clerk's papers in Martinez's appeal, and CP(V-C) refers to the clerk's papers in Veteta-Contreras's appeal.

Salvatrucha, also known as MS-13.⁵ RP 824-25, 911-13, 1016-17, 1118-19. Both men were carrying weapons. Veteta-Contreras showed off a machete that was hidden in his pants. RP 826-27, 914-18, 1023-25. Martinez displayed a revolver tucked in his pants. RP 829, 918-19, 1027-29, 1088. He opened the chamber, which was loaded with ammunition, and spun it. RP 1029-30. Both Martinez and Veteta-Contreras appeared to be either drunk or on drugs. RP 951-52.

The mention of gang membership and display of weapons did not frighten Barrera, Garcia and Monetti. RP 920. While Garcia left the group to get a sandwich, Monetti and Barrera accompanied Martinez and Veteta-Contreras as they approached other people in the parking lot. RP 534-37, 1035-37.

That night, Walter Flores-Cruz and his girlfriend Teresa Sierra had been dancing at the China Harbor Restaurant. RP 525-32. Shortly after 1:00 a.m., the couple left the restaurant and walked to their cars in the parking lot. RP 532-33, 781-85. As they talked outside their cars, four men, including Veteta-Contreras

⁵ After he was arrested, Martinez acknowledged that he was from El Salvador. RP 383.

and Martinez, approached them. RP 533-38, 786-90. Veteta-Contreras walked right up to Flores-Cruz, coming within three feet, and demanded twenty dollars. RP 534-36, 786. Veteta-Contreras spoke in Spanish, and Flores-Cruz, who grew up in El Salvador, recognized that Veteta-Contreras had a Salvadoran accent. RP 519, 543, 600.

Flores-Cruz refused the demand for money, stating, "Do I know you? I don't know you. Why do I have to give you money?" RP 535. Veteta-Contreras became more insistent; he lifted his shirt and pulled out a machete. RP 536-49, 792-93. He said that he was "La Mara," flashed an MS-13 gang sign and stated, "The beast is on the loose."⁶ RP 541-42.

Flores-Cruz told Sierra to get in her car and, as he opened her car door, he felt someone push him.⁷ RP 536-39, 791-800. Flores-Cruz pulled out a twenty-dollar bill and threw the money.

⁶ Flores-Cruz was familiar with La Mara Salvatrucha, one of the most dangerous gangs in El Salvador. RP 519-23.

⁷ In his brief, Martinez confuses testimony about the robbery of Flores-Cruz with the later attempted robbery of Duran-Acosta. He writes, "Strangely, although Cruz' friend Lopez-Pando testified that the short man with the machete hit Cruz in the side of the face, [citation omitted], neither Cruz nor his girlfriend Teresa Sierra ever said that Cruz was hit or even touched by the machete." Brief of Appellant Martinez at 15 n.7. Lopez-Pando was not present during the robbery of Flores-Cruz. Instead, Lopez-Pando was present during the attempted robbery of Duran-Acosta. RP 608-28.

RP 540. After the bill landed on top of a car, Martinez complained, 'What did you throw the money for? You know, don't throw the money at him.'" RP 540. At Martinez's suggestion, Veteta-Contreras demanded another twenty dollars, and Flores-Cruz complied, handing over another twenty-dollar bill to Veteta-Contreras. RP 540-44. As Flores-Cruz prepared to get in his car and drive off, Veteta-Contreras hugged him, and thanked him for the cash. RP 544.

The four men began calling Sierra names and blew her kisses. RP 549-51, 597, 794-95. Veteta-Contreras tried to open the door to her car, but she had locked her doors and drove away. RP 792-95. After Flores-Cruz got into his car, he called the police. RP 364-65, 544. He reported that he had been robbed of forty dollars by men with machetes and guns.⁸ Ex 14. The time of this call was 1:14 a.m. RP 364-65.

During the incident, the other two men remained in the background, and Flores-Cruz did not see their faces. RP 537. At trial, Sierra did not recall that there were two other men nearby. RP 786.

⁸ Flores-Cruz later admitted that he had not seen a gun. RP 546.

2. THE ATTEMPTED ROBBERY OF DURAN-ACOSTA.

Around this same time, Eliezer Duran-Acosta, his girlfriend Tui'ai Sefau,⁹ and his friends Juan Lopez-Pando and Michael Hackshaw were outside the China Harbor Restaurant waiting for some friends. RP 610-11, 686-91. Duran-Acosta noticed a group of men, including Veteta-Contreras and Martinez, who appeared to be looking for a fight and were screaming at someone in a red car.¹⁰ RP 690-95. Veteta-Contreras walked toward Duran-Acosta, with Martinez and two other men following. RP 611-13, 691-95.

When Veteta-Contreras came near, he demanded five dollars. RP 612-13, 694-96. Duran-Acosta and Lopez-Pando both responded that they did not have any money. RP 694. Veteta-Contreras became more aggressive, came within an inch of Duran-Acosta's face, demanded money again, and started to pat down Duran-Acosta's pockets. RP 694-95. Martinez also approached, coming within one foot of Duran-Acosta, and reiterated the demand

⁹ The transcript lists her first name as Tuyei. RP 686. The correct spelling is Tui'ai. CP(M) 31.

¹⁰ Duran-Acosta was likely witnessing the robbery of Flores-Cruz, who had a red car. RP 783.

for money. RP 695. Duran-Acosta pushed Veteta-Contreras away and told him that he would not give him anything. RP 694-96.

Veteta-Contreras, apparently recognizing Duran-Acosta's Puerto Rican accent, announced that Puerto Ricans "are a piece of shit." RP 613, 696. He also stated, "I'm crazy. I'm Mara Salvatrucha." RP 696. Veteta-Contreras then pulled out his machete, and Duran-Acosta turned to leave.¹¹ RP 698-99. Veteta-Contreras swung the machete, ripping the back of Duran-Acosta's shirt and leaving a bruise. RP 699-702.

Meanwhile, Martinez lifted his shirt and displayed a gun; he warned Lopez-Pando not to get involved or he could kill him. RP 615-17, 638-40, 702-03. Duran-Acosta turned around to take a swing at Veteta-Contreras, and Martinez flashed his gun. RP 702-03. Veteta-Contreras then hit Duran-Acosta several

¹¹ At trial, Duran-Acosta described Veteta-Contreras's weapon as a machete. RP 698, 708. That night, he did not get a good look at the weapon and thought it might be a club or cable. RP 736-37. However, Lopez-Pando came within a foot of the weapon and saw that it was machete. RP 615-16. When Duran-Acosta described the weapon as a cable to the police, Lopez-Pando corrected him and explained that it was a machete. RP 441. Duran-Acosta later saw how the weapon cut through his shirt, and realized that it could not have been a club or cable. RP 736.

times,¹² and Martinez told him to give him the money. RP 705-06, 737-39.

Monetti was standing behind Veteta-Contreras. RP 697. Duran-Acosta asked Monetti to get Veteta-Contreras away, but Monetti did nothing. RP 697, 722-30.

A security guard from China Harbor Restaurant had apparently noticed the commotion and came over. RP 622, 706. Martinez and Veteta-Contreras stated that everything was fine. RP 622, 706. When the security guard would not leave, Martinez and Veteta-Contreras left. RP 622-23, 707-08.

Lopez-Pando noted that both Martinez and Veteta-Contreras had Salvadoran accents. RP 624. All four men appeared to be drunk. RP 658.

¹² Duran-Acosta and Lopez-Pando had slightly different recollections of the sequence of events that occurred during the course of the attempted robbery. RP 613-26, 691-706. For example, Lopez-Pando testified that Veteta-Contreras hit Duran-Acosta in the face using the flat part of the machete blade. RP 615, 624-26.

3. THE POLICE RESPONSE.

Seattle Police Officers Felix Reyes and Michael Virgilio¹³ arrived at the scene and met with Flores-Cruz, who described how he had been robbed of forty dollars. RP 328-30, 557. Flores-Cruz led the officers toward the China Harbor Restaurant and pointed to Martinez and Robin Barrera. RP 329-43, 557-58, 925-28; Ex. 1.¹⁴ This identification occurred at 1:20 a.m., six minutes after the 911 call. Ex. 1. The officers frisked both men for weapons and found none. RP 342.

Officer David Terry responded and spoke with Flores-Cruz, who described how he had been approached by four people and robbed. RP 363-74, 387; Ex. 5.¹⁵ Flores-Cruz identified Martinez as one of the men who had robbed him. RP 370-74; Ex. 5. Flores-Cruz stated that Martinez had claimed to be a gangster and had

¹³ The transcriptionist refers to this officer as "Ragillio." RP 329. The correct spelling is set forth above. CP(M) 26.

¹⁴ Exhibit 1 is Officer Reyes's in-car camera video. At 1:20 a.m., the video shows Flores-Cruz running in front of the police car and then pointing to Martinez. See Ex. 1 (video # 7428@20100417011543). Martinez removes his hat after he is stopped. Id.

¹⁵ Officer Terry's interaction and conversation with Flores-Cruz was captured on videotape and played for the jury. RP 364-79; Ex. 5. The portion of the videotape that contained Officer Terry's conversation with Martinez was edited in order to exclude Martinez's acknowledgement that he was on probation, and apparent references to Veteta-Contreras. The edited video played for the jury was Ex. 6. RP 374-81.

threatened to kill him. RP 370-74; Ex. 5. He further explained that a different man had the "big knife." RP 370-72. Flores-Cruz stated that Barrera had not done anything but that he had been standing nearby. RP 372; Ex. 5.

Officer Terry then spoke with Martinez. Martinez stated that he was not in a gang and denied any involvement in the robbery. RP 392; Ex. 6. Without prompting, he lifted his shirt up to display that he did not have a weapon. RP 392-93.

Officer Terry then returned to Flores-Cruz and asked him if he was certain that Martinez had threatened him. RP 374. When Flores-Cruz said he was, Officer Terry arrested Martinez. RP 374. Martinez subsequently admitted to the officer that he was from El Salvador. RP 383.

Meanwhile, Seattle Police Officer John Schweiger had also responded to the scene and talked to Duran-Acosta and Lopez-Pando. RP 416-18; Ex. 10.¹⁶ Both men described how they had been confronted and threatened by Veteta-Contreras and Martinez. RP 419-20. Duran-Acosta referred to the men as Mexican, and Lopez-Pando corrected him and said they were Salvadoran.

¹⁶ The officer's interaction with Duran-Acosta and Lopez-Pando was recorded by an in-car police camera and the videotape was admitted at trial. RP 419-23; Ex. 10 (video 5177@20100417012213).

RP 424; Ex 10. Duran-Acosta described the man with the gun as tall, skinny, wearing a white t-shirt and having tattoos on his arms.

RP 469, 525; Ex. 10. Duran-Acosta stated that the man in a black t-shirt had a cable, but Lopez-Pando interjected that the weapon was a machete. RP 426, 441, 771-73.

Martinez had been detained a short distance away, and Duran-Acosta walked over and confirmed that Martinez was the man with the gun. RP 426, 434, 709-10; Ex. 10 (video 5177@20100417012213 at 1:32 a.m.). Because Duran-Acosta seemed hesitant, the officer asked if he was sure, and Duran-Acosta responded, "It looks like him." RP 468.

Meanwhile, Garcia and Monetti had begun walking back to Garcia's car. RP 839, 1043-45. Veteta-Contreras joined them and told them the police were coming. RP 839-40, 1045-46. He pulled out his machete and hid it behind a truck's bumper. RP 840-43.

Seattle Police Officer Chris Hairston was driving in the area and saw Veteta-Contreras, Monetti and Garcia walking together. RP 480-81. Believing that Garcia matched the suspect description, the officer exited his car, pulled out his firearm and ordered the men to the ground. RP 481-82, 1051. Garcia and Veteta-Contreras both complied, but Monetti threw an object, later identified as a

wallet, into the bushes and remained standing.¹⁷ RP 483-85, 493, 844, 1055, 1078. After the officer threatened to release his dog, Monetti went to the ground. RP 483. Monetti then got up on his elbows as though he was preparing to flee. RP 484-87. He also laughed and appeared to be drunk. RP 487, 499, 848.

Officer Hairston dealt with Garcia, and additional officers, including Detective Shandy Cobane and Officer Woollum, arrived. RP 484-87. At one point, in an incident captured on videotape and publicized in the media, Detective Cobane swore at Monetti, stating, "I'm going to kick the fuckin' Mexican piss out of you, homey, you feel me?" RP 489-90, 848-53, 1056, 1073-74, 1175; Ex. 12. When Monetti moved his hands toward his head, Detective Cobane responded by kicking him in the head. RP 490-91, 850; Ex. 12. Officer Woollum then used her foot to stomp down on Monetti's legs. RP 491.

Officer Schweiger transported Duran-Acosta to this scene. RP 429-33; Ex. 10. When Duran-Acosta saw Veteta-Contreras, he became excited and identified Veteta-Contreras as the person who had demanded money and hit him. RP 431-32, 469, 720-23;

¹⁷ Monetti later explained that he threw his wallet because it contained marijuana. RP 844-45.

Ex. 10. He also identified Monetti and stated that he had been in the group of four men but had not been an actual participant in the attempted robbery. RP 431, 720-26; Ex. 10. Duran-Acosta did not recognize Garcia. RP 721-23; Ex. 10. This identification was recorded on video. Ex. 10 (video 5177@20100417012213 at 1:39 a.m.)

After Monetti's wallet was retrieved from the bushes, a police officer confirmed his identification in the wallet and returned it to Monetti. RP 493-94.

That night, the police did a quick search in the area but did not find a gun or machete. RP 399-400. When they were booked into jail, Veteta-Contreras had approximately \$42 in cash and Martinez had approximately \$122. RP 670-71.

Martinez and Veteta-Contreras generally matched the description of the robbers. Witnesses at both robberies had described the man with the machete as the shorter of the two men and wearing dark clothing. RP 397-402, 426, 538-39, 635, 693, 730-31, 787-88, 823-24, 910. Witnesses described the man with

the gun as taller, thinner, and wearing a white shirt. RP 424, 538, 695, 790, 825, 831, 910.

4. THE LINEUP AND PHOTO MONTAGE.

On June 10, 2010, Detective Frank Clark invited several witnesses to view a lineup and photo montage. The detective arranged for a lineup consisting of Martinez and five other men. RP 1199-1203. Lopez-Pando and Barrera independently identified Martinez in the lineup as the man with the gun. RP 630-33, 931, 1200-09; Ex. 21.

Detective Clark also prepared a photo montage containing Veteta-Contreras's photograph.¹⁸ RP 1189-90, 1209-10; Ex. 18. Flores-Cruz, Lopez-Pando and Barrera selected Veteta-Contreras's photo and identified him as the man with the machete. RP 559-61, 629-30, 929, 1210-17.

Duran-Acosta looked at a photo montage containing a photograph of Monetti. RP 727-30, 1213-14. Duran-Acosta stated that Monetti was in the group of people present when he was

¹⁸ Detective Clark did not arrange for a lineup with Veteta-Contreras because, due to Veteta-Contreras's short stature, the detective could not find sufficient individuals with similar characteristics to fill the lineup. RP 1192.

robbed and assaulted, and that Monetti had stated that Duran-Acosta should just give him the five dollars. RP 1215-16.

5. THE CRIMINAL CHARGES AND TRIAL.

The State charged Martinez and Veteta-Contreras with first-degree robbery (victim: Flores-Cruz), attempted first-degree robbery (victim: Duran-Acosta) and felony harassment (victim: Lopez-Pando). CP(M) 20-22. The State also charged Veteta-Contreras with second-degree assault (victim: Duran-Acosta). CP(M) 21-22. On the robbery and assault counts, the State added a deadly weapon allegation based upon the machete. CP(M) 20-22. On the attempted robbery and felony harassment counts, the State charged a firearm enhancement and a deadly weapon enhancement. CP(M) 21-22.

The defense for both men was identification. During opening statement, defense counsel for Veteta-Contreras argued that his client was in the wrong place at the wrong time and that the identifications were wrong. RP(opening) 34. He acknowledged that the robbery and attempted robbery had occurred and that one

of the robbers had a machete. RP(opening) 35-37. He suggested that Monetti may have committed the crimes. RP(opening) 40-43.¹⁹

At trial, all of the civilian witnesses positively identified Martinez and Veteta-Contreras as the men who committed the crimes. Flores-Cruz positively identified Veteta-Contreras and Martinez as the men who robbed him. RP 537-38, 563. With respect to Veteta-Contreras, Flores-Cruz testified, "I can't forget his face." RP 562. Flores-Cruz's girlfriend, Teresa Sierra, also identified Veteta-Contreras and Martinez as the men who robbed Flores-Cruz. RP 789-95. Duran-Acosta identified Veteta-Contreras as the man with the machete and Martinez as the man with the gun. RP 693-95. Lopez-Pando stated that he was 100 percent positive that Veteta-Contreras was the man who threatened them

¹⁹ Martinez devotes a section of his brief to the premise that Monetti and Garcia matched the description of the robbers. He ignores the fact that several witnesses testified that Monetti was not involved in the robberies. On the night of the robberies, Duran-Acosta stated that he did not recognize Garcia and that Monetti had been present but not actively involved. RP 431-32, 469, 720-26; Ex. 10. Similarly, Lopez-Pando testified that Monetti had accompanied the robbers, but did not do anything. RP 627-28. Flores-Cruz did not recognize Monetti. RP 562-63. Moreover, the notion that Monetti and Garcia were the actual robbers was inconsistent with the evidence that the robbers claimed to be members of an El Salvadoran gang and had Salvadoran accents. RP 519, 534, 541-43, 600, 624. Martinez admitted that he was from El Salvador, but Monetti was born in Mexico, and Garcia was from Guatemala. RP 383, 809, 1007.

and Martinez was the man with the gun. RP 612-16, 633, 656, 693-95.

Monetti, Garcia and Barrera all testified and described how they met Martinez and Veteta-Contreras. RP 822-37, 909-24, 1015-34. All three men positively identified Veteta-Contreras as the man with the machete and Martinez as the man with the gun. RP 832-34, 920-22, 1032-34, 1062-63.

Monetti testified that his memory of events was poor because he was so drunk that night. RP 818, 865-73. He acknowledged that he observed Veteta-Contreras and Martinez walk up to people, display the machete, and demand money. RP 834-36. He stated that he did not tell the police what he knew about the robberies because he was drunk and because he was upset with the police for kicking him in the head. RP 860-61.

Barrera claimed that he saw Veteta-Contreras chase after someone with his machete, but denied that he ever saw the men rob anyone. RP 922-23, 953.

A jury found Martinez and Veteta-Contreras guilty on all counts as charged. CP(M) 360-67; CP(V-C) 67-76. The trial court imposed standard range sentences. CP(M) 377-80; CP(V-C) 92-95.

Both Martinez and Veteta-Contreras appealed their convictions, and this Court has consolidated the appeals.

Additional relevant facts are set forth below.

C. ARGUMENT

In their opening briefs, Veteta-Contreras and Martinez raise some identical issues and some unique issues. Veteta-Contreras also has adopted by reference some, though not all, of Martinez's arguments. The State addresses each issue in the order in which it arose during the case, identifying at the outset which defendant has raised the issue.

1. THE INFORMATION INCLUDED ALL ESSENTIAL ELEMENTS OF THE CRIME OF FELONY HARASSMENT.

For the first time on appeal, Veteta-Contreras argues that the charging language for the crime of felony harassment was fatally defective because it did not include the definition of a "true threat."²⁰ Brief of Appellant Veteta-Contreras at 57-61. This Court

²⁰ Martinez does not raise this issue; he was not charged with felony harassment.

has repeatedly rejected this argument, and Veteta-Contreras has not shown that these decisions were wrongly decided.

A charging document is sufficient if it sets forth all essential elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). When the sufficiency of a charging document is first raised on appeal, it is more liberally construed in favor of validity than if raised before verdict. Id. at 104-05. "Thus, we need only determine if the necessary facts appear *in any form* in the charging document." State v. Williams, 162 Wn.2d 177, 185, 170 P.3d 30 (2007) (emphasis in original). The goal of notice is met where a fair, commonsense construction of the charging document "would reasonably apprise an accused of the elements of the crime charged." Kjorsvik, 117 Wn.2d at 109. This liberal construction is to prevent "sandbagging" by removing an incentive to refrain from challenging a defective information before or during trial, when a successful objection would result only in an amendment to the information. Id. at 103.

With respect to the crime of felony harassment, the amended information in this case alleged that Veteta-Contreras "knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Juan Lopez Pando, by

threatening to kill Juan Lopez Pando, and the words or conduct did place said person in reasonable fear that the threat would be carried out." CP(V-C) 150. This language mirrors the statutory language for the crime. RCW 9A.46.020.

Veteta-Contreras claims that the amended information should have alleged that he made a "true threat." The term "true threat" is a term of art used to describe the permissible scope of threat statutes for First Amendment purposes. The Supreme Court has held that in order to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Id.

As Veteta-Contreras acknowledges, this Court has already rejected his argument that a "true threat" is an essential element of felony harassment. In State v. Tellez, 141 Wn. App. 479, 483, 170 P.3d 75 (2007), the Court held that "true threat" was not an essential element of felony telephone harassment and did not need

to be alleged in the charging document. Again, in State v. Atkins, 156 Wn. App. 799, 805, 236 P.3d 897 (2010), this Court held that the "true threat" concept was not an essential element of felony harassment: "the 'true threat' requirement need not be included in the charging document or the 'to convict' instruction."

Veteta-Contreras argues that these decisions must be re-considered in light of State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010). In Schaler, the Washington Supreme Court held that it was error to not define "true threat" in the jury instructions when the defendant was charged with felony harassment.²¹ Id. at 283-90. However, the court in Schaler expressly declined to address whether "true threat" was an element of the crime. Id. at 288 n.6.

This Court has rejected Veteta-Contreras's argument that the reasoning in Schaler establishes that the "true threat" concept is an essential element of felony harassment. State v. Allen, 161 Wn. App. 727, 751, 255 P.3d 784, rev. granted, 172 Wn.2d 1014 (2011). In Allen, the defendant argued that Schaler established that a true threat is an essential element of the crime of felony harassment, and that the information was deficient because it did

²¹ In this case, the jury was instructed with the definition of a "true threat." CP(V-C) 139.

not include that element. 161 Wn. App. at 748. After thoroughly reviewing the Schaler decision, this Court rejected this argument and concluded "that true threat is merely the definition of the element of threat which may be contained in a separate definitional instruction." Id. at 755.

Here, the amended information properly included all the elements of the crime of felony harassment. It was not necessary to allege the concept of "true threat" in the charging document. This Court should reject Veteta-Contreras's challenge to the information.

Even should this Court or the Supreme Court hold that the concept of "true threat" must be alleged in the charging document, a liberal reading of the amended information apprised Veteta-Contreras of this concept. A "true threat" is a statement made under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intent to inflict bodily harm upon or to take the life of another person. Kilburn, 151 Wn.2d at 43. Here, the amended information alleged that Veteta-Contreras, while armed with a machete and a gun, threatened to kill Juan Lopez-Pando. CP(V-C) 150. Given the specificity of these allegations, Veteta-Contreras

was on notice that he had been charged with making a threat that a reasonable person would interpret as a serious expression of an intent to inflict bodily harm.

2. THE TRIAL COURT PROPERLY ADMITTED MARTINEZ'S STATEMENTS TO THE POLICE.

Martinez claims that the trial court erred in admitting his statements to the police. Brief of Appellant Martinez at 104-11. For the first time on appeal, he argues that because the police initially stopped him at gunpoint, the trial court should have excluded all statements made before he was advised of his Miranda rights. This Court should decline to address this issue, given the failure to make this argument below and the absence of any argument addressing why it is preserved on appeal. Even if the issue is preserved, it lacks merit. Martinez does not challenge the conclusion that this was a valid Terry stop, and Washington courts have repeatedly held that the police are not required to provide Miranda warnings during a Terry stop.

a. Relevant Facts.

The trial court held a pretrial CrR 3.5 hearing. The State called Officer Terry as the only witness. Officer Terry arrived at the scene after other officers had detained Martinez and Barrera; by the time he arrived, both men were sitting on the ground.

RP 35-36; Ex. 9 and Pretrial Ex. 2.²² Neither Martinez nor Barrera was in handcuffs. RP 47. After Officer Terry spoke with Flores-Cruz, he released Barrera and asked Martinez questions.

RP 39-40; Ex. 9 and Pretrial Ex. 2. The officer testified that he wanted to talk with Martinez "[b]ecause if he had a story that convinced me he didn't have a part in it, I wasn't going to arrest him." RP 40. Martinez denied involvement in the crimes. RP 40; Ex. 9 and Pretrial Ex. 2; CP(M) 311-13. Officer Terry then went back to Flores-Cruz and confirmed Martinez's involvement. RP 44; Ex. 9 and Pretrial Ex. 2; CP(M) 313. The officer then arrested Martinez and advised him of his Miranda rights. RP 44.

The officers who initially stopped and detained Martinez, Officers Reyes and Virgilio, did not testify. After Officer Terry testified, Martinez's attorney agreed that the other officers'

²² Ex. 9 was formerly Pretrial Ex. 1, the in-car video from Officer Terry's patrol car. Pretrial Ex. 2 is a transcript of a portion of the video where Officer Terry talked to Martinez. RP 43.

testimony was unnecessary. RP 49 ("I'm not raising an issue that would require one of the officers -- one of the other officers to testify").

In a very brief argument, Martinez's counsel argued that Martinez's statements should be suppressed because he had not been read his Miranda rights and "there's clearly probable cause to arrest him by virtue of Mr. Flores[-Cruz] having told the officer what he told him." RP 50.

The trial court held that Martinez's statements to Officer Terry were admissible.²³ The court found that "this was a Terry stop.... a reasonable person would not believe he or she was under arrest... under the circumstances that Mr. Martinez was in." RP 55. The trial court subsequently entered findings of fact and conclusions of law consistent with its oral ruling. CP(M) 310-15.

**b. The Court Should Decline To Address
Martinez's New Challenge To The Admissibility
Of His Statements To The Police.**

In his challenge on appeal to the admission of his statements to the police, Martinez makes a new argument. He

²³ Some of Martinez's statements that referred to Veteta-Contreras were ultimately excluded pursuant to Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). CP(M) 311-14.

argues that because he was initially stopped at gunpoint, the police were required to give him Miranda warnings. Brief of Appellant at 104-11. The fact that he was stopped at gunpoint was not elicited at the CrR 3.5 hearing and was never argued to the trial court. Officer Terry, the sole witness at the CrR 3.5 hearing, was not present when this initial stop occurred. Martinez's counsel expressly represented to the court that it was unnecessary to hear testimony from any other officers and that his challenge to the admissibility of the statements was based only upon Officer Terry's testimony. RP 49. Similarly, his primary authority to support his new argument on appeal, United State v. Perdue, 8 F.3d 1455 (10th Cir. 1993), was never cited to the trial court.

As a general rule, issues cannot be raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). There is a limited exception where the issue being raised involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). "This exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal." State v. Trout, 125 Wn. App. 313, 317-18, 103 P.3d 1278 (2005). Instead, "manifest" in RAP 2.5(a)(3) requires a

showing of actual prejudice. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

Martinez makes no attempt to show that the asserted error had practical and identifiable consequences in the trial of the case. He provides no argument explaining how he suffered any prejudice by the admission of his statements to the police. In the admitted statement, he repeatedly denied any involvement in the robbery. CP(M) 311-14. Given the failure to raise the issue below, the limited record below and the absence of argument addressing the preservation issue, this Court should decline to address the issue. See State v. Campos-Cerna, 154 Wn. App. 702, 708, 226 P.3d 185 (refusing to consider challenge to Miranda warnings for the first time on appeal), rev. denied, 169 Wn.2d 1021 (2010); State v. Spearman, 59 Wn. App. 323, 325, 796 P.2d 727 (1990) (same).

- c. The Trial Court Properly Held That The Police Were Not Required To Provide Miranda Warnings.

A Terry stop is not “custody” for purposes of determining whether statements made during the stop are admissible under

Miranda, even though a suspect may not be free to leave when the statements are made. Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); State v. Heritage, 152 Wn.2d 210, 217-19, 95 P.3d 345 (2004). “The reason is that, unlike a formal arrest, a typical Terry stop is not inherently coercive because the detention is presumptively temporary and brief, is relatively less ‘police dominated’, and does not easily lend itself to deceptive interrogation tactics.” State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). “Thus, a detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect ‘in custody.’” Heritage, 152 Wn.2d at 218.

In this case, the officers conducted a classic Terry stop. Flores-Cruz led the police to Martinez and Barrera, and the police detained both men. Officer Terry spoke with Flores-Cruz in an effort to determine the involvement of the men. He then asked Martinez a moderate number of questions in an attempt to confirm or dispel suspicions about his involvement. The officer talked to Flores-Cruz again, confirmed that Martinez was involved, and, only

then, decided to arrest Martinez. Under settled caselaw, Miranda warnings were not required.

On appeal, Martinez argues that Miranda warnings were necessary because he had been stopped at gunpoint and a reasonable person would have felt that he was not free to leave. Whether Martinez felt that he was free to leave is not the standard for determining whether Miranda warnings are required. This Court has explained that "[b]y definition, someone subject to a Terry investigative detention is not 'free to leave.'" State v. Marcum, 149 Wn. App. 894, 909, 205 P.3d 969 (2009). The Supreme Court has explained:

In Berkemer, the United States Supreme Court also held that a brief Fourth Amendment seizure of a suspect, either in the context of a routine, on-the-street Terry stop or a comparable traffic stop, does not rise to the level of "custody" for the purposes of Miranda. Berkemer, 468 U.S. at 439-40, 104 S.Ct. 3138. Because a routine traffic stop curtails the freedom of a motorist such that a reasonable person would not feel free to leave the scene, a routine traffic stop, like a Terry stop, is a seizure for the purposes of the Fourth Amendment. Id. at 436-37, 104 S.Ct. 3138. However, the court recognized that because both traffic stops and routine Terry stops are brief, and they occur in public, they are "substantially less 'police dominated'" than the police interrogations contemplated by Miranda. Id. at 439, 86 S.Ct. 1602. Thus, a detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the

officer's suspicions without rendering the suspect "in custody" for the purposes of Miranda. Id. at 439-40, 86 S.Ct. 1602. Washington courts agree that a routine Terry stop is not custodial for the purposes of Miranda.

Heritage, 152 Wn.2d at 218 (footnote omitted).

Martinez suggests that in State v. Daniels, 160 Wn.2d 256, 266-67, 156 P.3d 905 (2007), the Supreme Court set a lesser standard for mandating Miranda warnings. It did not. In that case, "Seventeen-year-old Carissa Daniels was questioned for over 90 minutes by two police detectives at the precinct in an 8 foot by 10 foot room. She was not given any Miranda warnings until near the end of the interrogation." Id. at 266-67. In a brief discussion, the court held that the Court of Appeals correctly concluded Daniels was subjected to a "custodial interrogation because a reasonable person in Daniels's position would not feel free to terminate the interview and voluntarily leave." Id. at 267. The court's discussion of the issue did not purport to change Washington law about the need for Miranda warnings during a Terry stop.

Martinez also cites United State v. Perdue, supra, for the proposition that, because he was initially detained at gunpoint, Miranda warnings were required. Perdue is easily distinguishable. In Perdue, the court upheld the detention of the defendant as a

Terry stop, while noting that it "border[ed] on an illegal arrest."

8 F.3d at 1461-63. After summarizing the circumstances of the stop, the court held that Miranda warnings were required:

One cannot ignore the conclusion, however, that by employing an amount of force that reached the boundary line between a permissible Terry stop and an unconstitutional arrest, the officers created the "custodial" situation envisioned by Miranda and its progeny.... Mr. Perdue was forced out of his car and onto the ground at gunpoint. He was then questioned by two police officers while police helicopters hovered above. During the questioning, Mr. Perdue remained face down on the ground while the officers kept their guns drawn on him and his pregnant fiancée. The record indicates that physical force and handcuffs may also have been used in the initial detention....

As noted supra, Berkemer instructs that the "only relevant inquiry [when determining if a suspect is in 'custody'] is how a reasonable man in the suspect's position would have understood his situation." Berkemer, 468 U.S. at 442, 104 S.Ct. at 3151. A reasonable man in Mr. Perdue's position could not have misunderstood the fact that if he did not immediately cooperate, his life would be in danger. Any reasonable person in Mr. Perdue's position would have felt "completely at the mercy of the police." Berkemer, 468 U.S. at 438, 104 S.Ct. at 3149. We therefore find as a matter of law that Mr. Perdue was in police custody during the initial questioning by Officer Carreno.

Id. at 1464-65.

Here, Martinez was not questioned facedown at gunpoint in handcuffs with helicopters flying overhead. Instead, by the time

Officer Terry arrived, Martinez was sitting on the ground in a very public area. There were no guns pointed at him. He had not been handcuffed. He witnessed Officer Terry release Barrera, who had been stopped at the same time. The circumstances of the stop in this case do not approach those presented in Perdue. This was not a Terry stop that bordered on an illegal arrest. Miranda warnings were not required.

d. Any Error In Admitting Martinez's Statements Was Harmless.

Even assuming the court erred in admitting Martinez's statements to the police, any error was harmless. An error in admitting a statement or confession is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Young, 158 Wn. App. 707, 718, 243 P.3d 172 (2010), rev. denied, 171 Wn.2d 1013 (2011). In the admitted statements, Martinez repeatedly denied any involvement in the robbery. CP(M) 311-14. Moreover, the evidence that Martinez was one of the robbers was overwhelming. Less than thirty minutes after the crimes occurred, the two robbery victims positively

identified him at the scene; these same victims readily admitted when they did not recognize someone. Two additional witnesses later independently picked Martinez out of a lineup. Seven different witnesses positively identified him in court. Everyone consistently stated that he was the tall man in the white shirt with the gun. The evidence further indicated that the robbers were from El Salvador, and Martinez admitted he was from that country. Any reasonable jury would have reached the same verdict even if Martinez's statements had not been admitted.

3. THE TRIAL COURT DID NOT ERR IN ADMITTING THE IMMUNITY AGREEMENTS.

For the first time on appeal, Martinez and Veteta-Contreras claim that the trial court committed error in admitting the State's immunity agreements with Monetti. Martinez frames the issue as an evidentiary error, while Veteta-Contreras characterizes it as prosecutorial misconduct and also claims his lawyer's failure to object constituted ineffective assistance of counsel. Under any theory, the defendants have failed to preserve their claim of error because they both stated they had no objection when the immunity agreements were offered into evidence. Moreover, as a matter of

trial strategy, defense counsel clearly wanted these agreements in evidence; Veteta-Contreras's counsel explicitly encouraged the jury to review these agreements during their deliberations. Neither defendant can now be heard to complain on appeal that these agreements were admitted.

a. Relevant Facts.

Before Monetti agreed to be interviewed by defense counsel or to testify at trial, he insisted that he receive immunity. RP 814. On September 13, 2010, the State entered into an immunity agreement with Monetti. That agreement provided that, "In exchange for a complete, truthful account of any knowledge you may have relevant to the case, nothing that you say during the defense interview will be used against you in any criminal proceeding." Ex. 32. On September 16, 2010, attorneys for both defendants then interviewed Monetti. Ex. 33.

Shortly before Monetti testified at trial, the State entered into a second immunity agreement with him. That agreement stated in pertinent part:

As you know, I have met with your attorney, Robert Flennaugh II, concerning your witness of the events outside of China Harbor on April 17, 2010. I have

watched the video of your detention and subsequent injury by Seattle Police Officers during the course of the investigation, and have spoken with your friends, Robin Barrera and Denis Garcia Garcia as well as the victims of the robberies. I have also reviewed the police reports and other police videos in this case. I also met with you and your attorney and the defendants' attorneys for an interview in this case, and listened to what you were able to remember of this incident. Based on my review of these items, I do not believe that you played a criminal role in the robbery of either Eliezer Duran or Walter Flores Cruz (the two robbery victims) on the night in question. Based on my conversations with your attorney, my personal interviews with the myriad witnesses in this case, and my review of all the other evidence, I do believe that your testimony at trial is material to the case. Because I do not believe, based on this review, that the State can prove you played any role in the robbery, and because you have material evidence of the crimes, I am willing to offer you full immunity to prohibit you from making any 5th amendment claims to silence either for defense interviews or for trial testimony, regarding both the robbery and your admitted possession of marijuana on the early morning of April 17, 2010.

In exchange for your complete and truthful testimony about what you remember in this case, the State will not file charges of robbery related to this criminal investigation, or any other charges related to the robbery of Eliezer Duran or Walter Flores Cruz or your admitted possession of marijuana. If your testimony at trial leads to knowledge of completely separate charges, the State's immunity offer is limited only to circumstances surrounding the robbery of these two victims and possession of marijuana (for

example, if you state that the car you drove in to China Harbor was stolen, or that you had beat up someone in the parking lot, the State may still pursue charges for those crimes).

Ex. 32.

During opening statement, Veteta-Contreras's attorney suggested that Monetti had committed the robberies. RP(opening) 40-44. He speculated that Monetti had thrown a machete or gun into the bushes. RP(opening) 41. He further suggested that Monetti may have thrown his wallet because the forty dollars taken from Flores-Cruz was in the wallet. RP(opening) 42. He told the jury that Monetti had been given immunity. RP(opening) 44.

During cross-examination of Seattle Police Officer Chris Hairston, Veteta-Contreras's counsel focused his questions on Monetti's behavior after he was detained. RP 495-500. He asked whether Monetti appeared to be preparing to run and whether this was suspicious behavior. RP 497.

During Monetti's testimony, the prosecutor offered the immunity agreements into evidence. RP 814-16. The defense attorneys for both Martinez and Veteta-Contreras stated that they

had no objection to admission of the immunity agreements, and the court admitted the agreements.²⁴ RP 816.

Monetti testified at trial that he had gone to the China Harbor Restaurant with Garcia and Barrera. RP 817-22. He testified that he had been drinking before he got to the restaurant and that he drank more alcohol after arriving there. RP 818-23. Like Barrera and Garcia, he testified that they met Veteta-Contreras and Martinez in the parking lot and that Martinez had displayed a gun and Veteta-Contreras had a machete. RP 826-34. He admitted that he had then hung out with the two men. RP 837-38. He stated that he saw them approach people, ask for money and show the machete. RP 834-36. He explained that after seeing Veteta-Contreras and Martinez take money from people, he felt threatened and decided to leave. RP 836-37.

He testified that as he and Garcia were leaving, Veteta-Contreras joined them. RP 839-40. Monetti saw Veteta-Contreras

²⁴ Martinez claims that his attorney "indicated he had an objection but said that it could be taken up later at the conclusion of Monetti's testimony." Brief of Appellant at 33 n.11. In fact, his attorney stated, "No objection except for a matter that can be taken up at the conclusion of this witness's testimony." RP 816. It is unknown what this "matter" was - there was no further discussion of it or any objection to Exhibit 32.

hide his machete behind the bumper of a car. RP 840-44. Monetti stated that he threw his wallet when the police arrived because he had marijuana in it. RP 844-45.

During cross-examination by Veteta-Contreras's attorney, Monetti acknowledged that he had access to machetes at his work. RP 962-63. Monetti further acknowledged that he was planning to sue the police department. RP 973. Veteta-Contreras's attorney elicited from Monetti that it would be bad for his lawsuit if he had been involved in the robberies. RP 973.

Veteta-Contreras's attorney then turned to questioning Monetti about the immunity agreements. RP 973-76.

DEFENSE COUNSEL: And in your immunity deal, it says you need to testify truthfully, correct?

MONETTI: Yes.

DEFENSE COUNSEL: And that was part of our interview as well, truthfully, correct?

MONETTI: Yes.

DEFENSE COUNSEL: I want to talk about that word truthfully for a second. You told them what happened, right?

MONETTI: Yes.

DEFENSE COUNSEL: So from his perspective, you told him the truth, correct?

MONETTI: Yes.

PROSECUTOR: Objection. Calls for speculation.

THE COURT: Sustained.

DEFENSE COUNSEL: Your understanding of the immunity deal is that you had to testify to the same thing you told him in that meeting, correct?

MONETTI: Yes.

DEFENSE COUNSEL: So if you changed your story from that meeting, you might not get immunity?

MONETTI: Yes.

DEFENSE COUNSEL: So the deal says testify truthfully. Would it be fair to say in order to get immunity and not face criminal charges, you had to testify consistently with what you told them?

MONETTI: Yes.

RP 976.

During re-cross examination, Veteta-Contreras's attorney returned to the immunity agreements and asked a long series of questions about them. RP 998-1002. The questions highlighted that there were two agreements and that one agreement had just been signed the previous day. Id.

In closing argument, the prosecutor did not discuss Monetti's testimony in any detail, and he did not mention the immunity agreements. See RP 1471-1518. Martinez's counsel argued that

Monetti “was certainly involved in this” and that Garcia, Barrera and Monetti knew a lot more about what happened than they let on.

RP 1529. He then suggested that Monetti was exaggerating how drunk he was on that night in order to provide an “excuse for not remembering certain details.” RP 1530. He argued that Monetti had thrown his wallet into the bushes “[b]ecause he had \$40 in it that he had taken in a robbery.” RP 1531. He reminded the jury that Monetti had hired a lawyer and obtained immunity. RP 1532.

Veteta-Contreras's counsel argued at length that Monetti matched the description of the robber and that he had committed the crime. RP 1563-72. He mocked Monetti's testimony that he had seen Veteta-Contreras hide the machete, stating, "The State didn't even mention it in their closing. I'm not even sure if they believed it anymore." RP 1568. He argued that “Monetti’s testimony was full of lies. His actions are totally consistent with someone who robbed two people.” RP 1572. Veteta-Contreras's counsel then turned to the immunity agreements, telling the jury that they were in evidence and the jury would be able to read them. Id. He reminded the jury that Monetti had insisted on immunity and asked, “Why would he need immunity if he wasn’t involved at all?” Id.

In rebuttal, the prosecutor addressed the comments about

Monetti:

My case isn't resting on Martin Monetti. I mean, you guys saw the guy up there. He's a clown. He doesn't come off as a machete-wielding Mara Salvatrucha, but he's also not God's gift to science. I mean, the guy wasn't -- well, I should tread a little (inaudible). But did he appear on the stand like he had the presence of mind to forge this level of a sophisticated false identification case? To somehow pin it on these two fellows?

RP 1580-81. The prosecutor reviewed the testimony, noting that none of the witnesses had identified Monetti as one of the robbers.

RP 1583-84. The prosecutor then briefly responded to the issue of immunity, stating, "It's not a great taste in my mouth to give the guy immunity, but what are we going to charge him with? Being a drunken idiot?" RP 1585.

b. The Defendants May Not Challenge The Admission Of The Immunity Agreements For The First Time On Appeal.

For the first time on appeal, the defendants complain that the immunity agreements contain inadmissible opinion testimony consisting of the prosecutor's statements that he believed that Monetti did not play a criminal role in the robberies. Brief of

Appellant Martinez at 60-68.²⁵ The defendants have failed to preserve this claim of error because they did not object to the admission of this evidence at trial.

As discussed above, in order to raise an issue for the first time on appeal, the defendants must show that the issue being raised involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3); Scott, 110 Wn.2d at 684. Here, the defendants cannot meet this standard with respect to the admission of the immunity agreements.

The appellate courts have repeatedly recognized that the failure to object to inadmissible opinion evidence waives any challenge on appeal to the admission of the evidence. In State v. Kirkman, supra, the defendants claimed, for the first time on appeal, that certain testimony by detectives and a physician qualified as improper opinion evidence regarding the credibility of the victims. After reviewing the testimony in great detail, the court concluded that the testimony was not improperly admitted. 159 Wn.2d at 927-34. The court further observed that "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is

²⁵ Veteta-Contreras has adopted the arguments in Martinez's brief. Brief of Appellant Veteta-Contreras at 46.

not automatically reviewable as a 'manifest' constitutional error. 'Manifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim." Id. at 936. The court devoted a section of its opinion to the "actual prejudice" required to raise an issue for the first time on appeal, and noted that the defense had, as a matter of strategy, chosen not to object to the testimony and that the trial court had properly instructed the jury as to their role in assessing credibility:

It also appears from the respective records that defense counsel for both Kirkman and Candia chose not to object to the testimony for tactical reasons. Kirkman's defense counsel had determined to introduce other testimony of A.D.'s reputation for truthfulness. In Candia, some of the testimony was helpful to defendant, as the Court of Appeals conceded, stating that Dr. Stirling's testimony that it was unlikely the defendant could actually penetrate C.M.D. was "favorable to Candia." Candia now seeks to appeal the admission of a portion of testimony "which [he] obviously wanted to use in challenging his accuser's credibility."

The record in each case also establishes that each jury received specific instructions that they were the sole triers of fact and the sole deciders of the credibility of witnesses. Jury instruction 1 states that jurors "are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each." Jury instruction 6 states that jurors "are not bound" by expert witness opinions, but "determin[e] the credibility and weight to be given such opinion evidence." Jurors are presumed to follow the court's instructions. This court has even found

such instructions relevant (and curative) in claims of judicial comment on the evidence.

Id. at 937 (internal citations omitted).

While the Kirkman court ultimately held the testimony was not improper, in State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008), the testimony at issue was clearly improper opinion testimony. Montgomery was charged with possession of pseudoephedrine with intent to manufacture methamphetamine. 163 Wn.2d at 583. The State elicited testimony from several witnesses who opined as to Montgomery's guilt on the charge. A detective testified that, based upon his observations, he felt strongly that Montgomery was buying ingredients to manufacture methamphetamine. Id. at 587-88. A forensic chemist also testified that, based upon his review of what Montgomery had purchased, "this pseudoephedrine is possessed with intent." Id. at 588. The defense did not object to this testimony at trial. On appeal, Montgomery claimed that the admission of the testimony constituted a manifest error affecting a constitutional right. Id. at 588-95.

The Supreme Court agreed that the testimony "amounted to improper opinions on guilt" and that it "went to the core issue and

the only disputed element, Montgomery's intent." Id. at 594.

Nonetheless, the court held that Montgomery had failed to establish the necessary prejudice because the jury had been properly instructed that they were the sole judges of credibility:

[W]e have found constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences. Kirkman, 159 Wn.2d at 934-35, 155 P.3d 125.

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. See id. at 937, 155 P.3d 125. In Kirkman, this court concluded there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors "are the sole judges of the credibility of witnesses," and that jurors "are not bound" by expert witness opinions. Id. (quoting clerk's papers). Virtually identical instructions were given in this case. RP at 224, 226. There was no written jury inquiry or other evidence that the jury was unfairly influenced, and we should presume the jury followed the court's instructions absent evidence to the contrary. See Kirkman, 159 Wn.2d at 928, 155 P.3d 125.

Id. at 595-96.

Similarly, in State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496, rev. denied, 172 Wn.2d 1012 (2011), the State presented testimony that a detective had told the defendant that he did not believe her and that he believed that she was present during the murder and had asked a third person to commit the crime. On

appeal, Curtiss claimed that this testimony was improper opinion testimony that violated her jury trial rights. The Court of Appeals held that, even if the testimony was improper, Curtiss had waived any claim by failing to object. Id. at 697. The court explained:

[O]pinion testimony does not constitute reversible error where the trial court properly instructs the jury, as it did here, that it is the sole judge of witness credibility and not bound by witness opinions. State v. Montgomery, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008); see Kirkman, 159 Wn.2d at 937-38, 155 P.3d 125. Absent evidence that the jury was unfairly influenced, we presume that the jury followed the court's instructions. Montgomery, 163 Wn.2d at 596, 183 P.3d 267. As in Montgomery, there is no showing in this case that Detective Wood's interrogation questions unfairly influenced the jury verdict. Accordingly, even if Wood's statements were improper, Curtiss showed no unfair prejudice resulted from them.

Id. at 697-98; see also State v. Haq, ___ Wn. App. ___, 268 P.3d 997, 1019 (2012) (holding that Haq, charged with assault and murder, failed to preserve challenge to testimony by police officers that he was an "active shooter.").

Montgomery and Curtiss, which the defendants fail to cite or discuss, control resolution of this issue. Under those decisions, a defendant may not challenge improper opinion testimony for the first time on appeal when the trial court accurately instructs the jury as to their role in judging the credibility of the witnesses, absent

some evidence that the jury was unfairly influenced. In this case, as in Montgomery and Curtiss, the trial court properly instructed the jurors that they were the sole judges of credibility:

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

CP(M) 325. There is no evidence that the jury disregarded this instruction.

Moreover, here, unlike in Montgomery, the evidence at issue was not direct opinion testimony on the issue of the defendant's guilt. Instead, in the section that the defendants now challenge, the prosecutor indicated that he was offering Monetti immunity because he believed that Monetti did not play a criminal role in the robbery. Ex. 32. This section of the agreement was never discussed by any party during the course of the trial. At trial, the prosecutor never argued that his personal opinion about the involvement or credibility of Monetti should carry weight with the jury. Instead, his arguments in closing were focused on the testimony at trial.

Martinez relies primarily upon State v. King, 167 Wn.2d 324, 219 P.3d 642 (2009), for the proposition that his challenge to the immunity agreements may be raised for the first time on appeal. King is weak authority for this argument; in King, the Supreme Court did not decide whether the defendant could raise his challenge to opinion evidence for the first time on appeal.

King had been charged with reckless driving, and during trial, a police officer testified that he was familiar with the elements of reckless driving and that he believed King's driving was within those elements. Id. at 330. In closing, the prosecutor argued that the officer had opined that the driving was reckless. Id. at 331. King challenged this testimony for the first time on appeal, and a Court of Appeals Commissioner denied discretionary review because King had not objected at trial. Id. at 328-29. Citing Kirkman, the Supreme Court held that the Commissioner erred by failing to fully analyze whether the opinion testimony constituted manifest constitutional error. Id. at 332-33. However, the Court expressly declined to resolve the issue and reversed the case on a wholly separate basis. Id. at 333. King does not establish that the defendants may raise this issue for the first time on appeal.

c. Any Error In Admitting The Immunity Agreements Was Harmless.

Should this Court conclude that the admission of the immunity agreements constituted a manifest error affecting a constitutional right, the Court should nonetheless hold that the error was harmless beyond a reasonable doubt.²⁶ The prosecutor did not directly opine on the defendants' guilt or innocence, and the actual evidence of the defendants' guilt was overwhelming.

In the immunity agreements, the prosecutor did not opine as to the defendants' guilt. And contrary to Martinez's characterization, he did not even directly opine as to Monetti's credibility. Instead, in the portions now objected to, he opined that he did not believe that Monetti played a "criminal role" in the robberies. Ex. 32. Any juror paying the slightest attention during the trial would have not been surprised that the prosecutor held such an opinion, given that he was prosecuting the defendants, not Monetti, for the robberies.

The notion that the prosecutor was vouching for Monetti's credibility is not consistent with any fair reading of the record. In

²⁶ The constitutional harmless error standard would apply because, in order for the issue to have been preserved on appeal, this Court presumably would have concluded that the error was of constitutional magnitude.

fact, it is rather clear that the prosecutor treated Monetti as a compromised witness. During closing argument, the prosecutor insisted that the case was not based upon Monetti's credibility, and referred to him as a clown.²⁷ RP 1580-81. He observed that "[w]hatever [Monetti] was doing it wasn't great." RP 1585. These are hardly the words of a prosecutor vouching for a witness's credibility.

It was defense counsel, not the prosecutor, who focused on the immunity agreements during the trial. Defense counsel pointed out that under the agreement Monetti's testimony had to be consistent with the truth "from [the prosecutor's] perspective." RP 976. In closing argument, defense counsel encouraged the jury to review the immunity agreements during deliberations. RP 1572.

Moreover, the jury was properly instructed that they were the sole judges of the credibility of the witnesses. CP(M) 325. No one ever suggested or argued otherwise.

Finally, as discussed above in section C. 2. d., the evidence of the defendants' guilt was overwhelming. Numerous witnesses

²⁷ Martinez selectively presents portions of the prosecutor's closing argument in order to suggest that the prosecutor argued that Monetti's credibility was the central issue of the case. Brief of Appellant at 64. In fact, a reading of the full argument reveals that is not the case.

identified them at the scene and later in a lineup and photo montage. It is inconceivable that a short portion of the immunity agreement somehow impacted the jury's decision.

d. Veteta-Contreras Is Not Entitled To Relief Under A Prosecutorial Misconduct Theory.

Citing State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010), Veteta-Contreras frames the issue as prosecutorial misconduct, claiming that the immunity agreement consisted of improper vouching. Brief of Appellant Veteta-Contreras at 46-55.²⁸ Given the lack of any objection, this claim is without merit.

When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it

²⁸ Martinez also asserts a prosecutorial misconduct claim based upon the prosecutor's closing argument. That issue is addressed in section C. 9. below.

causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

In Ish, the parties argued over the admissibility of an immunity agreement between the State and Ish's cellmate. 170 Wn.2d at 193. Over the defense objection, the trial judge allowed the prosecutor to elicit testimony that the agreement required the cellmate to tell the truth while testifying. Id. at 193-94. On appeal, Ish argued that, by presenting this testimony, the prosecutor improperly vouched for the cellmate's credibility. Id. at 195.

The Supreme Court agreed, but held that the error was harmless. Id. at 198-200. The court applied the test governing claims for prosecutorial misconduct, and held that the defendant bore the burden of showing a substantial likelihood that the misconduct affected the jury's verdict. Id. at 200. Citing the evidence at trial and the fact that the prosecutor asked only two questions about the immunity agreement, the court did not have "any difficulty" concluding that Ish had failed to establish prejudice. Id. at 200-01.

Here, unlike in Ish, there was no objection at trial to the alleged misconduct. Accordingly, Veteta-Contreras must show the error was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Veteta-Contreras acknowledges this standard, and simply asserts that the error could not have been remedied by a curative instruction.²⁹ Yet had Veteta-Contreras made an appropriate objection, the trial court could easily have cured any error by redacting the immunity agreements before they went to the jury. Veteta-Contreras could have even raised the issue at any time prior to deliberations, given that during the trial testimony, no attorney or witness even mentioned the portions of the immunity agreement that are now challenged. Because an appropriate objection would have cured the alleged error, this claim of prosecutorial misconduct is waived.

- e. Veteta-Contreras Has Failed To Establish That He Received Ineffective Assistance Of Counsel.

Veteta-Contreras also claims that he received ineffective assistance of counsel because his attorney did not request that the

²⁹ Brief of Appellant Veteta-Contreras at 31.

immunity agreements be redacted. Brief of Appellant Veteta-Contreras at 55-57. Given the obvious strategic reasons for not objecting to the admission of the immunity agreements or requesting their redaction, Veteta-Contreras cannot establish deficient performance. Nor has he shown that he suffered prejudice from the admission of the unredacted immunity agreements.

To prevail on a claim of ineffective assistance of counsel, Veteta-Contreras must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 334-35; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either element of the test is not satisfied, the inquiry ends. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

"The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel." State v. Kolesnik, 146

Wn. App. 790, 801, 192 P.3d 937 (2008). Veteta-Contreras does not acknowledge this standard, nor attempt to explain how the facts in this case qualify as "egregious circumstances."

The record strongly indicates that Veteta-Contreras agreed to the admission of the unredacted immunity agreements for obvious tactical reasons. Veteta-Contreras's strategy was to argue that Monetti committed the robberies. The admission of the entire unredacted immunity agreement furthered this strategy by suggesting that the State's case was dependent upon the notion that Monetti was not involved in the crimes. If the prosecutor was wrong about Monetti's involvement, presumably he was wrong about other aspects of the case. Accordingly, when discussing the immunity agreement, Veteta-Contreras's counsel asked, "Why would [Monetti] need immunity if he wasn't involved at all?"

RP 1572.

Monetti was a compromised witness; he was drunk on the night of the crimes, had behaved suspiciously when the police detained him, and had insisted on immunity. He testified so poorly that the prosecutor barely mentioned him in closing argument, and in rebuttal, acknowledged that Monetti was "a clown" and argued that the State's case "isn't resting on Martin Monetti." If the jury

thought the State's case depended upon Monetti, it served to weaken the State's case. Defense counsel could make the reasonable strategic decision that the unredacted immunity agreements could support this strategy. Veteta-Contreras has not shown that his trial attorney was deficient by not seeking to redact the immunity agreements.

Veteta-Contreras has also failed to show that there is a reasonable probability that, had his counsel arranged to redact portions of the immunity agreements, the result of the proceeding would have been different. While the standard of review is more favorable to the State in this instance, the arguments made above in section C. 2. d. concerning harmless error apply equally here. Veteta-Contreras cannot show that he suffered prejudice.

4. THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE RELATING TO MARTINEZ'S TATTOOS.

Martinez claims that the trial court erred by admitting a photograph showing tattoos on his arms and by allowing Duran-Acosta to testify that he recognized some, though not all, of these tattoos. Brief of Appellant Martinez at 72-79. In making this claim, Martinez argues that the constitutional standards governing the

identification of persons extend to the identification of tattoos. However, Washington caselaw does not support this claim, and the majority of jurisdictions addressing the issue have held that the constitutional standards governing the identification of persons do not extend to tattoos.

Even if the same constitutional standards apply, Martinez has not shown that the in-court identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. At trial, Duran-Acosta demonstrated that he was fully capable of resisting any suggestions; he repeatedly stated he did not remember one of Martinez's most prominent tattoos. Finally, because Duran-Acosta positively identified Martinez at the scene and in court, any error in admitting testimony about the tattoos was harmless.

a. Relevant Facts.

On the night of the attempted robbery, Duran-Acosta noticed that Martinez had tattoos on his arms. RP 694-95, 704. He reported this observation to the police. RP 469. That night, he identified Martinez as the man with the gun. RP 426, 434, 709-10.

During his testimony at trial, Duran-Acosta described one of the men as: "a taller one, white T-shirt, had tattoos on his arm, shorts, blue shorts." RP 694-95. He then identified Martinez in court as this man. RP 695. There was no objection to the in-court identification.

The prosecutor later asked Duran-Acosta a series of questions about Martinez's tattoos and showed him Exhibit 28, two close-up photographs of the tattoos. Again, Martinez's counsel did not object to these questions.

PROSECUTOR: Did you notice anything about tattoos on either Hector Veteta-Contreras or Pedro Martinez?

DURAN-ACOSTA: I noticed that Pedro [Martinez] had tattoos on his arms. But how they looked, I do not remember how they looked.

PROSECUTOR: If you saw a photograph of the tattoos, would you be able to remember some or all of them?

DURAN-ACOSTA: I might remember something.

THE CLERK: State's Exhibit 28 is marked for identification. (State Exhibit 28 marked)

PROSECUTOR: I'm showing you what's been marked as State's 28. And I know it's been a long time. Looking at the tattoos on the forearm, are you able to recognize those as the tattoos on Mr. Martinez, or are you not sure?

DURAN-ACOSTA: I remember -- I kind of remember the one on the right arm. I remember the flames. I don't remember seeing the rose, but I remember the flames because I saw the top side of his arm.

PROSECUTOR: And do you remember also saying that he had tattoos on the inside of his arms?

DURAN-ACOSTA: I don't remember the inside. I remember the outside.

PROSECUTOR: Just one moment. That night when you first identified Mr. Martinez, at that point were you able to recognize the tattoos on the person who was on the ground as the same tattoos in the same place... as the person who had had the gun, or do you remember?

DURAN-ACOSTA: I remember the tattoo. I don't remember how it looked like. I remember at first all I said was he had tattoos on his arms. That's all I remember saying.

THE CLERK: State's Exhibit 29 is marked for identification. (State Exhibit 29 marked)

....

PROSECUTOR: I want to refer you to an interview that you did, page 33, line 12. And you're asked about the first time that you saw Mr. Pedro right after the robbery. Just read that line quietly to yourself. I just want to see if that helps you remember whether or not at the time that you IDed Pedro Martinez you recognized the tattoos.

DURAN-ACOSTA: Yeah.

PROSECUTOR: All right. And Mr. Duran I'm not asking you if today you can look at those tattoos and say, yeah, those are the ones. What I'm asking is at the time that you saw Mr. Martinez sitting on the

ground, you were able to recognize the tattoos on his arms as the tattoos on the arms of the person that had participated in the robbery?

DURAN-ACOSTA: Yes.

PROSECUTOR: Okay. So now after looking at that interview, were you?

DURAN-ACOSTA: Like I said, I did not remember what they looked like, but he had tattoos on his arms.

PROSECUTOR: And did those, the tattoos that you saw, match your memory with respect to the placement?

DURAN-ACOSTA: Yes, because as I said, the top part, it looked like a flame, but I did not see the inside that had the rose because I saw him at this point arguing with Hector, he is right here, so I can only see him through the corner of my eye.

PROSECUTOR: Do you remember the tattoos being on his forearm? The lower part of his arm?

DURAN-ACOSTA: No, I do not. I did not pay attention to those.... I remember -- because he had -- his shirt had kind of big sleeves, so I could see from here down.

PROSECUTOR: So by forearm, I mean the bottom half of the arm. Do you remember the tattoos being on the bottom half of the arm?

DURAN-ACOSTA: Yeah.

RP 711-13.

During a break in the testimony, Martinez's counsel indicated that he had an objection to the prosecutor offering more pictures of

the tattoos into evidence. He noted that the prosecutor had marked several more pictures as potential exhibits and complained that the pictures showed that Martinez was in custody and that the prosecutor was conducting "a showup ID" with the photographs. RP 714-15. After some back and forth between defense counsel and with the judge, the prosecutor explained that he wished to use another photograph showing the tattoo with flames curling on the side of the arm. RP 716. After the judge reviewed the photo, he asked defense counsel to explain his "show-up" objection. RP 717.

MR. FLORA: This has all the features of a show-up ID wherein (inaudible) is much more specific. We don't have any information from this witness about what the tattoos looked like, and then he's shown tattoos of -- that are obviously on Mr. Martinez and asked are these the tattoos that you remember?

THE COURT: And the problem with that is what?

MR. FLORA: It's a show-up ID. It's impermissibly suggestive. Oh, yes, here's the tattoos that I remember attached to the arm and body of the person sitting here in the courtroom.

THE COURT: Well, it's clearly suggestive, but I don't see what's impermissible about it, so I'll allow the State to proceed that way.

RP 714-18.

The prosecutor then asked a few more questions about the tattoos and the court admitted exhibit 30, a single photograph showing Martinez and the tattoos on his arms.

PROSECUTOR: Hold this to yourself so that no one else can see it. That's State's 30. Does that angle better capture one of the outsides of Mr. Martinez's forearms?

DURAN-ACOSTA: Yeah.

PROSECUTOR: What do you see?

DURAN-ACOSTA: I see a tattoo.

PROSECUTOR: Of what?

DURAN-ACOSTA: Of a flame.

PROSECUTOR: Is that consistent with the flames that you described to us?

DURAN-ACOSTA: Yeah.

PROSECUTOR: Is that what you remember?

DURAN-ACOSTA: Yeah.

PROSECUTOR: State moves to admit 30.

THE COURT: Defense.

MR. FLORA: No further objection.

MR. DUBOW: No objections.

THE COURT: 30 is admitted.

RP 719.

Defense counsel then proceeded to cross-examine Duran-Acosta about whether in prior interviews he had previously described the tattoo of flames:

MR. FLORA: Okay. And today you told us that you -- that you remember flames?

DURAN-ACOSTA: Yes, I remember flames because -- how do I say this?

MR. FLORA: Well, maybe I can suggest an answer. You saw flames on the arms of the picture that you just saw?

DURAN-ACOSTA: Yeah.

MR. FLORA: Okay. And you never described these tattoos to anybody until today; is that right?

DURAN-ACOSTA: Until today because I saw a picture of it, and it brought back memory.

MR. FLORA: So in any of these other interviews you didn't say, yeah, I remember flames?

DURAN-ACOSTA: Because what I can remember was this side of the arm, this area right here. I don't remember the flower. I remember from this side.

RP 764-65.

b. The Constitutional Standards Governing The Identification Of Persons Do Not Apply To The Identification Of Tattoos.

A photographic identification of a person violates due process if it is so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). Martinez's argument on appeal is premised on the theory that the constitutional standards governing the identification of persons extend to the identification of tattoos. However, Washington caselaw does not support this claim, and the majority of jurisdictions addressing this issue have rejected it.

Washington courts have held that the constitutional standards governing the identification of persons do not apply to the identification of clothing worn by the suspect. In State v. King, 31 Wn. App. 56, 59-60, 639 P.2d 809 (1982), the robbery victim did not recognize King, but could identify King's brown leather coat as the one that the robber was wearing. Although the trial court found the identification procedure inherently suggestive, it refused to apply the constitutional standards governing the identification of persons because the witness identified the jacket, not King. Id. at 59-60.

The Court of Appeals affirmed, holding that United States Supreme Court cases about the dangers of a suggestive identification addressed their concerns only to identification of people. Id. at 60-62. The court reasoned that every person is unique, and when a “witness identifies an individual as the perpetrator of a crime, not only will that be direct and highly persuasive evidence against defendant, but also the eyewitness will be reluctant to change his identification.” Id. at 61. In contrast, the court noted that clothing is not as unique and the identification of such objects did not pose an irreparable risk of misidentification. Id. at 61-62. Further, the court observed that “such evidence is for the jury to weigh; even evidence with some element of untrustworthiness is customary grist for the jury mill.” Id. at 62.

More recently, in State v. Johnson, 132 Wn. App. 454, 462, 132 P.3d 767 (2006), the Court of Appeals reaffirmed King and held that “any suggestiveness in the identification of clothing is properly raised during cross-examination and argument.” The court further noted that in the twenty-five years since King, the caselaw had reinforced that decision. “King is in accordance with the great weight of federal and state authority holding that Biggers’

procedural protections do not apply to identification of physical evidence.” Id. at 461.

While no Washington court has addressed the issue of tattoo identification, most courts considering the issue have held that constitutional standards governing the identification of persons do not apply to the identification of tattoos. Commonwealth v. Crock, 966 A.2d 585, 586-88 (Pa. Super. Ct. 2009); Belisle v. State, 11 So.3d 256, 296-98 (Ala. Crim. App. 2007), aff'd, 11 So.3d 323 (Ala. 2008); State v. Newcomb, 934 S.W.2d 608 (Mo. Ct. App. 1996).³⁰ In so holding, one court has noted the similarity between identifying tattoos and items of clothing. Crock, 966 A.2d at 588-89.

Like clothing, tattoos are not unique. The identification of a tattoo does not pose the same risk of irreparable misidentification that arises when a witness identifies an individual. The facts of this case aptly demonstrate this point. Duran-Acosta testified that he recalled only a tattoo of flames on the arms. Such a tattoo is hardly

³⁰ Martinez does not acknowledge these authorities but cites one out-of-state case in support of his argument, Rawlings v. State, 720 S.W.2d 561 (Tex. Crim. App. 1986). In Rawlings, the rape victim could not identify her assailant except for a tattoo on his hand. Id. at 563-69. Though the defendant’s tattoo did not match the victim’s description, she positively identified the defendant’s tattoo after first being advised that he was the suspect. Id. The court reversed the conviction, holding that the tattoo identification procedure was impermissibly suggestive. Id. at 577. In the opinion, there is no indication that the court considered whether the constitutional standards governing the identification of persons should apply to the identification of tattoos.

unique. Indeed, in closing argument, Martinez's counsel observed that it was common to have tattoos on the arms, commenting that a basketball player would incur "a two-shot penalty if you don't have your arms covered with tattoos." RP 1523. He further noted that tattoos of "flames aren't really all that unusual." RP 1524. Because tattoos generally are not unique, this Court should hold that the constitutional standards that apply to the identification of persons do not extend to the identification of tattoos.

c. Martinez Has Failed To Show That There Was A Substantial Likelihood Of Irreparable Misidentification.

Even assuming that the constitutional standards governing identification of persons apply to the identification of tattoos, the trial court did not abuse its discretion in admitting the testimony. A trial court's decision to admit identification evidence is reviewed for an abuse of discretion. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). The trial court did not abuse its discretion in permitting the testimony and admitting the photograph showing Martinez's tattoos.

The standards for evaluating Martinez's claim are well-settled:

To meet due process requirements, an out-of-court identification must not be “so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.” To make this determination, we employ a two-part test. First, the defendant must show the identification procedure was impermissibly suggestive. Show-up identifications are not per se impermissibly suggestive. If the defendant fails to make this showing, the inquiry ends.

If the defendant proves the procedure was impermissibly suggestive, under the second step of the analysis, “the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification.” To make this determination, courts consider: “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.”

State v. Birch, 151 Wn. App. 504, 514, 213 P.3d 63 (2009) (internal citations omitted), rev. denied, 168 Wn.2d 1004 (2010).

Citing State v. Maupin, 63 Wn. App. 887, 896, 822 P.2d 355 (1992), Martinez argues that the use of a single photograph was impermissibly suggestive as a matter of law. While Martinez accurately characterizes the holding in Maupin, the “per se” language in that decision is not consistent with decisions by this Court and the United States Supreme Court. For example, in Manson v. Brathwaite, 432 U.S. 98, 109, 97 S. Ct. 2243, 2250,

53 L. Ed. 2d 140 (1977), cited in Maupin, the United States Supreme Court rejected a per se rule excluding identification evidence based upon a single photograph. Similarly, Washington courts have repeatedly held that a show-up involving only one person is not impermissibly suggestive. Birch, 151 Wn. App. at 513-14; State v. Gould, 58 Wn. App. 175, 184-85, 791 P.2d 569 (1990); State v. Guzman-Cuellar, 47 Wn. App. 326, 335-36, 734 P.2d 966 (1987). As the court has explained, "A suggestive procedure such as a showup is not per se impermissibly suggestive." Guzman-Cuellar, 47 Wn. App. at 336. It is not possible to reconcile the notion that a showup with one person may not be impermissibly suggestive, yet the showup of one photograph is impermissibly suggestive as a matter of law.

Here, while the use of photographs of only Martinez's tattoos may have been suggestive, Duran-Acosta's testimony demonstrates that the procedure was not impermissibly suggestive. Prior to any objection, the prosecutor first showed Duran-Acosta two close-up photographs of Martinez's tattoos. RP 711-13; Ex. 28. Though Duran-Acosta had already identified Martinez in court, he demonstrated that he was fully capable of resisting the suggestive nature of the inquiry. He repeatedly stated that he did not

remember seeing a rose tattoo on Martinez's arm, though it was shown in the photographs. RP 711-13. When Martinez subsequently objected to showing Duran-Acosta additional photographs, the trial court, having heard his testimony, could reasonably conclude that the use of the photographs was not impermissibly suggestive. This finding was not an abuse of discretion.

Even assuming that the procedure was impermissibly suggestive, the totality of the circumstances indicates that the procedure did not create a substantial likelihood of irreparable misidentification. Duran-Acosta testified that at the time of the attempted robbery, Martinez came within one foot of him. RP 695. When the police arrived, Duran-Acosta reported that one of the robbers had tattoos on his arms. RP 469. Duran-Acosta then identified Martinez at the scene approximately five to ten minutes after the attempted robbery. RP 710. Given these circumstances, the in-court identification of a portion of Martinez's tattoos did not create a substantial likelihood of irreparable misidentification.

d. Any Error Was Harmless Admitting The Tattoo Evidence Was Harmless.

Given the limited nature of the tattoo testimony challenged on appeal, any error was clearly harmless beyond a reasonable doubt. This evidence was relevant to establishing that Martinez was the man with the gun. However, it was a minor piece of evidence when considering the substantial identification evidence introduced at trial. At the scene, Duran-Acosta and Flores-Cruz both identified Martinez as one of the robbers. RP 329-43, 426, 434, 557-58, 709-10, 925-28. Flores-Cruz's identification was captured on videotape. Ex. 1. In the lineup, Lopez-Pando and Barrera both picked Martinez as the man with the gun. RP 630-33, 931, 1200-09; Ex. 21. At trial, Flores-Cruz, Sierra, Duran-Acosta and Lopez-Pando all positively identified Martinez as one of the robbers. RP 537-38, 563, 612-16, 633, 656, 693-95, 789-95. Similarly, Garcia, Barrera and Monetti all identified Martinez as the man with the gun. RP 832-34, 920-22, 1032-34, 1062-63. Any error in admitting the testimony that Duran-Acosta recognized some, though not all, of Martinez's tattoos was harmless.

5. THE DEFENDANTS' BELATED CHALLENGE TO THE "TO CONVICT" INSTRUCTION FOR FIRST-DEGREE ROBBERY SHOULD BE REJECTED.

For the first time on appeal, the defendants complain that the "to convict" instruction for Count I, Instruction Nos. 14 and 15, included an uncharged alternative means. Brief of Appellant Martinez at 79-83.³¹ However, because both defendants joined in proposing the "to convict" instruction that they now challenge, this Court should hold that the invited error doctrine bars them from challenging it on appeal. Moreover, Martinez's claim is based upon the erroneous proposition that there are alternative means within alternative means for the crime of first-degree robbery. This argument is inconsistent with well-established caselaw and the plain language of the statute. The "to convict" instruction did not include an uncharged alternative means.

a. Relevant Facts.

At trial, with respect to the first-degree robbery charged in Count I, Flores-Cruz testified that the only weapon he saw was a machete. RP 539, 547-48. He stated that he never saw a gun.

³¹ Veteta-Contreras has adopted the arguments on this issue in Martinez's brief. Veteta-Contreras Notice to Adopt Argument of Co-Appellant.

RP 597-98. Teresa Sierra also testified that Veteta-Contreras pulled out a machete during this robbery. RP 792-93.

In Count I, the State charged Veteta-Contreras and Martinez with the first-degree robbery of Walter Flores-Cruz. The amended information alleged that the defendants "did unlawfully and with intent to commit theft take personal property of another... by the use or threatened use of immediate force, violence or fear of injury to such person or his property... and in the commission of and in immediate flight therefore, the defendants displayed what appeared to be a deadly weapon, to wit: a machete." CP(M) 20. On this same count, the defendants were charged with a deadly weapon sentencing enhancement based upon the machete. Id.

At the beginning of trial, both defense counsel requested that they be excused from submitting a complete packet of jury instructions if they agreed with the instructions proposed by the State. RP 16-17. The trial court agreed with this procedure. RP 17.

The trial court subsequently provided draft instructions to the parties. Martinez and Veteta-Contreras stated that they were satisfied with these instructions and they joined in proposing them. RP 1277-81. The "to convict" instruction for Count I stated:

To convict the defendant ... of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 17 April 2010, the defendant unlawfully took personal property from the person or in the presence of Walter Flores-Cruz;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property;
- (5) That in the commission of these acts or in the immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon; and
- (6) That any of these acts occurred in the State of Washington.

CP(M) 339-40.

During closing argument, the prosecutor discussed the elements of this count and identified the machete as the deadly weapon supporting the charge. RP 1480. The jury convicted Martinez and Veteta-Contreras as charged on this count and found, by special verdict, that they were armed with a machete and that the machete was a deadly weapon. CP(M) 360-61; CP(V-C) 67-68.

b. Under The Doctrine Of Invited Error, The Defendants May Not Challenge Jury Instructions That They Proposed.

Martinez complains that the "to convict" instruction for Count I included the term "firearm" and argues that the display of an apparent firearm is a distinct alternative means from the display of an apparent deadly weapon. However, both defendants requested that the trial court give the instructions at issue; thus, they are barred from challenging it on appeal. Under the doctrine of invited error, a party may not set up an error at trial and then claim on appeal that the trial court erred on that basis. State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Under this doctrine, a party cannot challenge an instruction that he proposed. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). The invited error doctrine applies even where the alleged error is of constitutional magnitude. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002); Henderson, 114 Wn.2d at 871. Martinez and Veteta-Contreras cannot challenge the jury instruction that they proposed.

Even if the invited error doctrine did not apply, the defendants face another hurdle in attempting to challenge these instructions on appeal because, by not objecting, they did not

preserve the issue for review. RAP 2.5(a)(3). As noted above, in order to establish that the error is "manifest," the defendants must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Kirkman, 159 Wn.2d at 935. The defendants cannot show they suffered any actual prejudice due to the wording of the "to convict" jury instruction because, as discussed more fully below, the claim that an uncharged alternative means was included in the instruction is without merit, and, in any event, it is clear that the jury unanimously found that the defendants were armed with a machete on Count I. This Court should hold that the defendants have not preserved their challenge to the "to convict" jury instruction for Count I.

c. **Martinez's Challenge To The "To Convict" Instruction Is Without Merit.**

Should this Court choose to address the merits of Martinez's challenge to the "to convict" instruction, it should hold that his claim is without merit. The premise of his claim is that there are alternative means within alternative means for first-degree robbery. He asserts that he was charged with "display of an apparent deadly weapon" alternative means of first-degree robbery, and complains

that the jury was also instructed on "display of an apparent firearm" alternative means. Martinez offers no analysis of the first-degree robbery statute and cites no caselaw accepting his alternative means within alternative means theory. In fact, his assumption that there are alternative means within means is flawed and is inconsistent with existing law. Even if the court accepts his alternative means theory, he cannot show how he suffered any prejudice given that, in light of the special verdict finding, the jury unanimously found the "display of an apparent deadly weapon" alternative means charged in the information.

First-degree robbery is defined as follows:

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200.

The elements set forth in subsections (a)(i), (a)(ii) and (a)(iii) are alternative means of committing the crime of first-degree robbery. State v. Nicholas, 55 Wn. App. 261, 272, 776 P.2d 1385 (1989). Citing no caselaw and offering no argument on the point, Martinez claims that subsection (a)(ii) contains two separate alternative means within this alternative means.

The appellate courts have repeatedly rejected similar "means within means" arguments. In In re Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988), a capital case, the jury had found two statutory aggravating circumstances:

(a) That the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime; or

(b) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant; ...

Id. at 338. On collateral review, Jeffries argued that, as a result of the use of the disjunctive "or," each of these aggravating circumstances contained alternative means and the jury was required to unanimously agree on the alternative means. Id. at 339-40. Specifically, he argued that the jury was required to agree unanimously that he had committed the murder either "to conceal

the commission of a crime,” or “to protect the identity of a person committing a crime,” or “to conceal the identity of a person committing the crime.” Id. at 339-40.

The Supreme Court dismissed this argument as creating “means within means.” Id. at 339-40. The court rejected the notion that use of the word “or” within a criminal statute creates an alternative means, observing that “[h]is ‘means within means’ argument raises the spectre of a myriad of instructions and verdict forms whenever a criminal statute contains several instances of use of the word ‘or.’” Id. at 339.

Similarly, in State v. Laico, 97 Wn. App. 759, 987 P.2d 638 (1999), the Court of Appeals rejected the argument that the three alternative definitions of “great bodily harm” contained in RCW 9A.04.110(4)(c) were alternative means of committing first-degree assault. The court held that “the definition of ‘great bodily harm’ does not add elements to the first degree assault statute, but rather is intended to provide understanding.” Id. at 764.

Again, in State v. Al-Hamdani, 109 Wn. App. 599, 36 P.3d 1103 (2001), this Court rejected a claim that a subsection of the second-degree rape statute contained two alternative means. The relevant portion of the statute provided that “[a] person is guilty of

rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person.... (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." Id. at 602. Citing Jeffries and Laico, the court held that "physically helpless" and "mentally incapacitated" were not alternative means of the crime of rape. Id. at 603-07.

With respect to first-degree robbery, the alternative means are clearly set forth in separate subsections. The element that the defendant "displays what appears to be a firearm or other deadly weapon" is a single alternative means of committing the crime. The use of the disjunctive "or" does not create two separate alternative means of committing the crime. Instead, this is a single means involving the circumstance where the defendant displays what appears to be a weapon, whether it be a firearm or another kind of deadly weapon.

Martinez fails to cite a single case holding that RCW 9A.56.200(1)(a)(ii) contains two separate alternative means. In cases cited by Martinez, there was no question that the jury instructions actually included alternative means of committing the

crime that had not been charged.³² Because RCW 9A.56.200(1)(a)(ii) contains *one* alternative means of committing first-degree robbery, this claim fails.

Even assuming there was error in the "to convict" jury instruction for Count I, any error was certainly harmless. An error in instructing on an uncharged alternative means is presumed prejudicial unless it affirmatively appears that the error was harmless. State v. Perez, 130 Wn. App. 505, 507, 123 P.3d 135 (2005). In Perez, the court found the error harmless because as a matter of law the uncharged means shared the same statutory definition as the charged means. Id. at 506.

Here, any error in the "to convict" instruction was clearly not prejudicial, given the jury's special verdict on Count I. The special verdict establishes that the jury unanimously found, beyond a reasonable doubt, that, with respect to Count I, the defendants were armed with a machete and that the machete was a deadly

³² See, e.g., Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948) (defendants charged under one subsection of the statute, but the judge instructed on a different subsection); State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (jury instructions erroneously included alternative means of forcible rape set forth in separate subsection); Nicholas, 55 Wn. App. at 272 (recognizing that RCW 9A.56.200(1)(a) and RCW 9A.56.200(1)(b) are alternative means of committing robbery); State v. Bray, 52 Wn. App. 30, 33, 756 P.2d 1332 (1988) (jury instructions erroneously included alternative means of forgery set forth in separate subsection).

weapon. Moreover, the undisputed testimony was that no firearm was displayed during the commission of this robbery, and the prosecutor never suggested otherwise. The record affirmatively establishes that the defendants suffered no prejudice.

6. VETETA-CONTRERAS HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Veteta-Contreras claims that his convictions for first-degree robbery and attempted first-degree robbery must be reversed because the instruction defining the term "robbery," Instruction No. 13, included an uncharged alternative means: that the defendant "was armed with a deadly weapon." Brief of Appellant Veteta-Contreras at 32-43. Recognizing that the doctrine of invited error prevents him from challenging an instruction that he joined in proposing, he raises this issue through an ineffective assistance of counsel claim.

This claim fails because Veteta-Contreras has failed to establish a reasonable probability that the results of the trial would have been different if this alternative means was not included in the instruction. Based upon the testimony and evidence in this case, it is inconceivable that the jury could have convicted Veteta-

Contreras based upon the “armed with a deadly weapon” alternative means without finding the “displayed what appears to be a deadly weapon” alternative means.

In Counts I and II, the State charged the defendant with first-degree robbery and attempted first-degree robbery. CP(V-C) 148-49. For both counts, in the amended information, the State alleged the alternative means in RCW 9A.56.200(1)(a)(ii): that the defendants “displayed what appeared to be a deadly weapon.” CP(V-C) 148-49. The instruction defining robbery in the first degree stated: “[a] person commits the crime of robbery in the first degree when in the commission of a robbery he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.” CP(V-C) 125. When provided with this proposed instruction, Martinez and Veteta-Contreras stated that they were satisfied with it and joined in proposing it. RP 1277-81.

Veteta-Contreras now complains that he received ineffective assistance of counsel because his attorney joined in proposing the definitional instruction. As noted above, in order to establish ineffective assistance of counsel, Veteta-Contreras must show that defense counsel's representation was deficient, and that there is a reasonable probability that, except for counsel's unprofessional

errors, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 334-35. In order to show that he suffered prejudice, Veteta-Contreras must show that it is reasonably probable that the jury convicted him based upon the uncharged alternative means rather than the charged alternative means. Given the similarity of these two alternative means and the evidence at trial, Veteta-Contreras cannot show prejudice.

The alternative means at issue are very similar. The charged means required that the State prove that the defendants displayed what appeared to be a firearm or other deadly weapon. RCW 9A.56.200(1)(a)(ii). The uncharged alternative means requires proof that the defendant was armed with a deadly weapon. RCW 9A.56.200(1)(a)(i). In this case, the evidence supporting these alternative means was the same; it was only by the defendants' display of the deadly weapons that the State could prove that they were armed with the weapons.³³ Neither of the two deadly weapons, the firearm or the machete, was recovered, and the only evidence at trial about these weapons came from the descriptions by the witnesses of how the defendants displayed

³³ Though this alternative means of robbery was not charged, the State was required to prove that the defendants were armed with a deadly weapon and firearm because it alleged the deadly weapon and firearm enhancements.

them. The jury could not find that the defendants were armed with deadly weapons without first concluding that they had displayed them. There is no danger that the jury somehow convicted Veteta-Contreras of robbery and attempted robbery without finding that he or his accomplice displayed what appeared to be a deadly weapon.

Moreover, with respect to Count I, the "to convict" instruction included only the charged alternative means for committing the crime. CP(V-C) 126. In order for Veteta-Contreras to have suffered any prejudice by the language in the definitional instruction, the jurors would have had to disregard their instructions that they must find all of the elements listed in the "to convict" instruction. However, the jurors are presumed to follow their instructions,³⁴ and Veteta-Contreras offers no explanation why this Court should presume that they did otherwise. He certainly has not established a reasonable probability that they did so.

Veteta-Contreras cites one case involving an ineffective assistance claim based upon an uncharged alternative means in the jury instructions, State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). In Doogan, the defendant was charged with

³⁴ State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

second-degree promoting prostitution. That crime has two alternative means: profiting from prostitution and advancing prostitution. Id. at 187-88. Though the State charged Doogan with the "profiting from prostitution" alternative means, the trial court gave instructions that included an uncharged alternative means of "advancing prostitution." Id. at 188. The court noted that "the uncharged means (advancing) covers a wider range of activity than the charged means." Id. at 189-90. The court further observed that, based upon the evidence at trial, the jury could have found that Doogan had advanced prostitution without finding that she profited from it. Id. at 190. The court held that Doogan had established the prejudice required for an ineffective assistance of counsel claim because there was "a reasonable possibility [sic] that the jury convicted Doogan on the uncharged means of advancing prostitution without ever considering whether, as charged, she profited from prostitution." Id. at 189.

Here, unlike Doogan, there was no basis in the evidence for the jury to find that the defendants were armed with a deadly weapon, without first finding that they displayed what appeared to be a deadly weapon. In fact, the "display" alternative means covers broader behavior than the "armed" alternative means because the

State is not even required to prove the existence of an actual deadly weapon in the former situation. Unlike in Doogan, there is no reasonable probability that the jury convicted Veteta-Contreras on the uncharged means of “armed” robbery without ever considering whether, as charged, he displayed what appeared to be a deadly weapon.

Veteta-Contreras also cites to several decisions where the appellate court reversed convictions due to the inclusion of an uncharged alternative means in the jury instructions. State v. Lane, 36 Wn.2d 227, 217 P.2d 322 (1950); State v. Bray, 52 Wn. App. 30, 756 P.2d 1332 (1988). However, in both cases, the defendant did not invite the error and the issue was not raised as an ineffective assistance of counsel claim. Therefore, the standard applied on appeal was that the error was presumed prejudicial unless it affirmatively appeared that it was harmless. Lane, 36 Wn.2d at 231-35; Bray, 52 Wn. App. at 34-35.

Moreover, in Bray, the State discussed the uncharged alternative means in closing argument, and on appeal, the State continued to insist that the jury could rely upon the uncharged alternative means in convicting the defendant as an accomplice.

52 Wn. App. at 35-36. Not surprisingly, given these facts, the court held that the State had failed to establish the error was harmless.

Here, because the claim is ineffective assistance of counsel, the burden is on Veteta-Contreras to establish prejudice. Unlike Bray, the prosecutor did not refer to the uncharged alternative in closing argument.³⁵ Perhaps more importantly, the fact that a robbery was committed by displaying what appeared to be a deadly weapon was not in dispute. The disputed issue was the identity of the robbers. Veteta-Contreras also has not shown a reasonable probability that the results of the trial would have been different had the definitional instruction not included the uncharged alternative means.

7. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON THE INFERIOR DEGREE OFFENSES.

Both defendants claim that the trial court erred in failing to instruct on inferior degree offenses. However, the trial court

³⁵ Veteta-Contreras claims that the prosecutor invited the jury to convict him based upon the uncharged alternative means, noting that the prosecutor discussed the fact that he “possessed a deadly weapon” and argued that a machete was a deadly weapon. Brief of Appellant Veteta-Contreras at 41-42. However, he overlooks that he was charged with several deadly weapon enhancements, and in order to prove these enhancements, the prosecutor was required to prove that he was actually armed with a deadly weapon.

properly declined to give these instructions because the evidence in the case did not support an inference that only the inferior crimes were committed to the exclusion of the charged offenses. There was no evidence that the defendants committed robbery, attempted robbery or assault without displaying what appeared to be a firearm or other deadly weapon.

a. Relevant Facts.

At trial, Martinez and Veteta-Contreras proposed instructions for inferior degree crimes. For the first-degree robbery and attempted first-degree robbery counts, they proposed second-degree robbery and attempted second-degree robbery. CP(M) 316-21; CP(V-C) 53-62. In addition, for the second-degree assault count, Veteta-Contreras proposed a fourth-degree assault instruction. CP(V-C) 64-65.

Defense counsel offered very brief argument in support of these instructions. Veteta-Contreras's attorney stated that, "given the lack of production of the weapons, it's a question of credibility of the witnesses for the jury to decide whether they believe -- if there was a robbery, where there was a weapon involved." RP 1277. With respect to the fourth-degree assault instruction, he stated,

"Mr. Duran[-Acosta] said he was punched as well as hit with a machete, but his back was to the perpetrator. Given that he wasn't cut or bleeding, I think it's reasonable the jury could find that he was only punched and there wasn't a weapon used, which would be the factual basis for the assault four." Id.

Martinez's attorney offered no additional argument on this issue. RP 1277. The trial court denied the request for the inferior degree instructions, finding that "[t]here is no affirmative evidence that only the lesser offense was committed." RP 1279. After this ruling, Martinez's attorney stated, "[J]ust to add, in this case, all the evidence -- there is no weapon. All the evidence is based on eyewitness testimony, but I don't have anything more to add to that." RP 1279.

b. The Defendants May Not Assert A New Theory In Support Of Inferior Degree Instructions For The First Time On Appeal.

"Exceptions to the failure of the trial court to give an instruction must clearly apprise the trial judge of the points of law involved." City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). If the exception does not do so, the points of law or issues involved will not be considered on appeal. Id. When

a defendant objects to an instruction on one theory at trial, he may not then make a challenge on appeal based upon a new theory. State v. Harris, 62 Wn.2d 858, 872-73, 385 P.2d 18 (1963); State v. Owens, 24 Wn. App. 130, 133-34, 600 P.2d 625 (1979).

These settled rules apply to a request for inferior degree instructions. For example, in State v. Brown, 36 Wn. App. 166, 672 P.2d 1268 (1983), the defendant took exception to the trial court's decision to not give a proposed lesser included instruction, but offered no legal basis for the exception. The Court of Appeals held that the defendant failed to properly preserve the issue on appeal. "CrR 6.15(c) requires a party to state the reasons for objecting to the instructions given or refused. Where a party fails to follow the requirement of CrR 6.15(c), the appellate court will not consider the alleged error." Id. at 170.

Here, at trial, the defendants made a brief and simple argument in support of their proposed inferior degree instructions: they argued that the instructions were warranted because the weapons were never recovered. Not surprisingly, given that all the witnesses had testified that the defendants had displayed weapons, the trial court rejected this argument. The defendants do not repeat this argument on appeal. Instead, they offer new arguments; they

claim that the jury could have concluded that a cable or club, rather than a machete, was used or that the machete did not qualify under the statutory definition of "deadly weapon." These arguments were not made below. In fact, during the trial, the defendants never disputed that a machete was involved or that it qualified as a deadly weapon. On appeal, the defendants cannot make new arguments, that the trial court never had an opportunity to consider, in support of the inferior degree instructions.

c. The Evidence Did Not Support An Inference That Only The Inferior Degree Crimes Were Committed.

A defendant is entitled to an instruction on an inferior degree offense if the defendant satisfies the three-part test: (1) the statutes for the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). Under the factual part of this test, "the evidence must raise an inference that only the lesser included/inferior degree offense was committed to

the exclusion of the charged offense." Id. at 455. The evidence must affirmatively establish the defendant's theory of the case; it is not enough that the fact finder might simply disbelieve the evidence pointing to guilt. Id. at 456. When the trial court refuses to give an inferior degree instruction based on the facts of the case, the appellate court reviews the decision for an abuse of discretion. State v. Hunter, 152 Wn. App. 30, 43, 216 P.3d 421 (2009).

Here, the evidence did not affirmatively establish that the defendants committed only the proposed inferior degree offenses. With respect to the robbery counts, the difference between the charged crimes and the requested inferior degree offenses is the element that the defendants "displayed what appeared to be a firearm or other deadly weapon." In order to satisfy this element, "[t]he State is not required to prove that the defendant brandished the weapon or that the victim saw the weapon." State v. Kennard, 101 Wn. App. 533, 539, 6 P.3d 38 (2000). This alternative means of first-degree robbery is intended to "proscribe conduct in the course of a robbery which leads the victim to believe the robber is armed with a deadly weapon, whether the weapon is actually loaded and operable or not, and whether the weapon is real or toy." State v. Henderson, 34 Wn. App. 865, 868, 664 P.2d 1291 (1983).

With respect to the first-degree robbery count, neither defendant offers any argument explaining how the evidence relating to this count affirmatively established that the defendants committed only second-degree robbery. In his brief, Veteta-Contreras does not assign error to the failure to give an inferior degree instruction for Count I. While Martinez assigns error with respect to this count, he does not discuss the evidence relating to it in his argument on the issue. Brief of Appellant Martinez at 86-92. This Court should decline to consider this claim of error as to Count I because it is unsupported by argument. Madison v. State, 161 Wn.2d 85, 92 n.4, 163 P.3d 757 (2007); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).³⁶

With respect to the attempted first-degree robbery and second-degree assault counts, both defendants argue that a lesser included instruction was warranted because the jury may have doubted whether a machete was actually used or whether a

³⁶ The evidence supporting Count I did not affirmatively establish that the defendants committed only second-degree robbery. The testimony established that Veteta-Contreras walked up to Flores-Cruz and demanded twenty dollars. RP 534-36, 786. When Flores-Cruz refused, Veteta-Contreras lifted his shirt and pulled out a machete. RP 535-49, 792-93. He said that he was "La Mara," flashed an MS-13 gang sign and stated, "The beast is on the loose." RP 541-42. There is no evidence that the robbery was committed without the display of the machete.

machete qualified as a deadly weapon. However, for both crimes, the record did not support an inference that only the inferior crime was committed.

First, with respect to the attempted robbery count, the defendants' arguments ignore the evidence that a gun was displayed during the attempted robbery of Duran-Acosta. During this attempted robbery, Martinez lifted his shirt and flashed his gun. RP 615-17, 638-41, 702-03. The defendants do not explain how, given the testimony that a gun was displayed, a lesser included instruction was warranted. See State v. Pacheco, 107 Wn.2d 59, 70, 726 P.2d 981 (1986) (in a first-degree robbery case, trial court properly declined to instruct on second-degree robbery given the evidence that whoever committed the robbery displayed a knife).

Ignoring the gun, Martinez suggests that the machete may not have qualified as a deadly weapon, citing cases where the weapon was not displayed during the crime. For example, In re Martinez, 171 Wn.2d 354, 256 P.3d 277 (2011), the defendant was arrested after he burglarized an uninhabited farm shop. A police officer noticed that Martinez had an empty knife sheath on his belt, Martinez admitted his knife must have fallen out when he ran from the police, and the police later recovered it nearby. Id. at 358. The

Supreme Court held that the evidence was insufficient to establish that the knife qualified as a deadly weapon, explaining, "No one saw Mr. Martinez with the knife, and he manifested no intent to use it. Furthermore, no one saw Mr. Martinez reach for the knife at any time after he was apprehended." Id. at 368.

Martinez notes that the Martinez court disapproved of State v. Gamboa, 137 Wn. App. 650, 154 P.3d 312 (2007), where the Court of Appeals held "that a machete used to forcibly enter a home was a deadly weapon, despite the lack of evidence that it was used or intended to be used as a weapon." Martinez, 171 Wn.2d at 368 n.6. The Supreme Court explained that, "By characterizing a machete as a deadly weapon on the sole basis of its dangerousness and without regard to its actual, attempted or threatened use, the Gamboa court essentially read the circumstances provision out of the statute and treated the machete as if it were a deadly weapon per se." Id.

In this case, unlike Martinez and Gamboa, Veteta-Contreras actually brandished the machete in a threatening manner while demanding money. Veteta-Contreras demanded money from Duran-Acosta and patted down his pockets. RP 694-95. When Duran-Acosta refused, Veteta-Contreras insulted and threatened

Duran-Acosta and pulled out the machete. RP 696-98. Duran-Acosta testified that Veteta-Contreras "tried to scare me with it." RP 698. When Duran-Acosta turned his back, Veteta-Contreras struck him with the machete, slicing through Duran-Acosta's shirt. RP 699-701. Under the circumstances in which it was threatened to be used, the machete was readily capable of causing death or substantial bodily harm and qualified as an apparent deadly weapon. RCW 9A.04.110(6).

The defendants also argue that there was some evidence that this weapon was not a machete, citing the fact that Duran-Acosta initially described the weapon to the police as a club or cable. In fact, the evidence was overwhelming that Veteta-Contreras had a machete. Six different witnesses, Flores-Cruz, Sierra, Lopez-Pando, Monetti, Barrera, and Garcia, testified that they saw Veteta-Contreras brandishing a machete. Duran-Acosta testified that he did not get a good look at the weapon, but after he saw how it cut through his shirt, he realized it could not have been a club or cable. RP 736. The evidence that the weapon was a machete was so overwhelming that defense counsel acknowledged in opening statement that a machete was used. RP(opening)

35-38. In closing argument, both defendants acknowledged that a machete was involved. See RP 1535, 1545-49.

With respect to the second-degree assault count, Veteta-Contreras was entitled to an inferior degree instruction only if the record supported an inference that the assault was committed solely with a non-deadly weapon. See State v. Winings, 126 Wn. App. 75, 86-89, 107 P.3d 141 (2005) (rejecting fourth degree assault instruction when defendant brandished sword but caused minimal injury to victim). Here, Veteta-Contreras pulled out his machete and swung it, slicing the back of Duran-Acosta's shirt and leaving a bruise. RP 698-702. The evidence did not affirmatively establish that Veteta-Contreras assaulted Duran-Acosta without a deadly weapon.

d. Martinez Has Not Shown That The Well-Settled Test For Instructing On Inferior Degree Offenses Is Unconstitutional.

For the first time on appeal, Martinez argues that the well-settled standard for instructing on inferior degree offenses is unconstitutional. Martinez challenges State v. Fowler, 114 Wn.2d 59, 785 P.2d 808 (1990), in which the Supreme Court held that in order to justify a lesser included instruction, it was not enough that

the jury simply disbelieve the State's evidence, but some evidence must be presented that affirmatively established the defendant's theory on the lesser included offense. Martinez notes that in several earlier cases, the court had stated that a lesser included instruction was warranted unless the evidence positively excluded the lesser included offense. Brief of Appellant Martinez at 93-94. The premise of Martinez's claim is that Washington courts are bound by this earlier standard under Washington Const. art. I, § 21. There are several flaws in this claim.

First, Martinez cites no Washington authority for the proposition that a defendant has a state constitutional right to a particular test for determining when the trial court should instruct on an inferior degree offense. The purpose of the constitutional provision that he cites, article I, section 21, is to preserve inviolate the right to a trial by jury as it existed at the time of the adoption of the constitution. State v. Smith, 150 Wn.2d 135, 150-51, 75 P.3d 934 (2003). Martinez fails to cite any constitutional history or preexisting state law supporting the conclusion that at the time the state constitution was adopted, a defendant had a constitutional right to a particular test for determining whether an instruction on an inferior degree offense should be given. Instead, he cites to a

number of cases that have nothing to do with inferior degree instructions. See State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910) (holding that a statute abolishing the insanity defense was unconstitutional); Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989) (holding that a statute placing a limit on the noneconomic damages recoverable by a personal injury or wrongful death plaintiff was unconstitutional).

Not only does Martinez not cite any caselaw that a defendant has a constitutional right to a *particular test* for instructing on an inferior degree offense, he does not cite any authority that there is a constitutional right to an inferior degree instruction. The Washington Supreme Court has recognized that the failure to instruct on lesser included offenses is not an error of constitutional magnitude. State v. Lord, 117 Wn.2d 829, 880, 822 P.2d 177 (1991); Scott, 110 Wn.2d at 688 n.5.³⁷ Instead, the right to a lesser included offense developed as part of the common law. State v. Berlin, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). There is no constitutional right implicated by what test is employed

³⁷ Similarly, most federal and state courts have held that there is no federal constitutional right to a lesser degree instruction. See People v. Sherman, 172 P.3d 911 (Colo. Ct. App. 2006) (summarizing caselaw on the issue).

in determining when to give a lesser or inferior degree offense instruction.

A second flaw in Martinez's argument is his assertion that the Supreme Court in Fowler suddenly adopted a new test for deciding when to give an inferior degree instruction. While prior to Fowler the appellate courts articulated a variety of tests on the issue, the language he challenges in Fowler can be traced back nearly a century.

Fowler cited to an earlier Court of Appeals opinion, State v. Rodriguez, 48 Wn. App. 815, 820, 740 P.2d 904 (1987), which repeated the proposition that in order to instruct on a lesser included crime, some evidence must be presented affirmatively to establish that theory, other than that the jury simply disbelieve a portion of a witness's testimony. In Rodriguez, a police officer testified that he bought marijuana from the defendant, who was then charged with delivery of marijuana. Id. at 815-16. The Court of Appeals affirmed the trial court's decision to not instruct on the lesser included offense of possession of marijuana. Id. at 816. The court recognized that "it is conceivable, given a lesser included instruction, that the jury could have chosen to disbelieve [police officer]'s testimony about the sale and delivery but believe his

testimony about the defendant's possession." Id. at 819. The court, however, concluded, "The jury may always disbelieve any portion of a witness's testimony, but if the defendant would urge as an alternative theory that he committed only [the included crime], some evidence must be presented affirmatively to establish that theory." Id. at 820 (quoting State v. Wheeler, 22 Wn. App. 792, 797, 593 P.2d 550 (1979)).

Rodriguez cited to a Washington Supreme Court case, State v. Turner, 115 Wash. 170, 196 P. 638 (1921), as support for its holding. In Turner, the defendant was convicted of bootlegging and assigned error to the trial court's failure to give an instruction on the lesser offense of unlawful possession of liquor. The Supreme Court rejected the claim of error, given that there was no affirmative evidence that only the lesser crime occurred:

In this case, however, the testimony of the state's principal witness, Hatvedt, that he had purchased one drink, at the time alleged, from appellant, which was delivered to him in a glass in the rear of a pool hall, and that the liquor delivered to him by appellant was moonshine whisky, there being no other evidence of the possession of any unlawful liquor by appellant except that delivered to the state's witness, the offense charged was either consummated by the sale to the state's witness as testified to or there was no offense committed at all.... [T]here is no justification for instructing the jury that they might find the

defendant guilty of the lesser offense of the unlawful possession of intoxicating liquor.

While we have always held that the jury has a right, under our Criminal Code, to determine the degree of the offense which was committed, we have also uniformly held that that determination must be based upon evidence.

Id. at 173-74.

Accordingly, while Martinez cites a number of cases suggesting a more liberal standard for instructing on a lesser included offense, a fair review of the caselaw reveals that there have been varying formulations of the appropriate test. For the last quarter of a century, however, Washington courts have applied the standard enunciated in Fowler, and Martinez has not established that this standard is unconstitutional.

Finally, even under the test for instructing on inferior degree offenses proposed by Martinez, the instructions were properly declined. The evidence positively excluded any inference that the inferior degree offenses were committed. There was no evidence of a robbery without the display of an apparent deadly weapon or firearm. Similarly, there was no evidence that the assault on Duran-Acosta occurred without the use of a deadly weapon.

Martinez cites State v. Donofrio, 141 Wash. 132, 250 P. 951 (1926), as a case with remarkable "similar facts," where the court held that the inferior degree intrusion should have been given. Donofrio was charged with second-degree assault, and the victim described being struck in the head with something she did not see. Id. at 134-37. The Washington Supreme Court held that the trial court should have instructed on third-degree assault because "the jury might well have believed that [the victim] did not see any weapon or instrument in the hand of the accused likely to produce bodily harm, but that he struck her with his bare fist or hand...." Id. at 137.

In comparing Donofrio to this case, Martinez ignores the testimony of the many witnesses who described the machete that Veteta-Contreras brandished that night. Even under Martinez's test, the trial court did not err in declining to instruct on the inferior degree offenses.

8. SUFFICIENT EVIDENCE SUPPORTS MARTINEZ'S FIRST-DEGREE ROBBERY CONVICTION.

The defendants challenge the sufficiency of the evidence on their first-degree robbery conviction charged in Count I. Brief of

Appellant Martinez at 83-86.³⁸ The premise of this claim is that display of an apparent firearm is an alternative means within the alternative means for the crime of first-degree robbery. Martinez argues that because there was no evidence that a firearm was displayed during the robbery of Flores-Cruz, the evidence is insufficient to support one of the alternative means, and, therefore, the conviction must be dismissed.

As discussed above, this alternative means theory is incorrect. The State was not required to present evidence that Martinez displayed a firearm. See State v. Smith, 159 Wn.2d 778, 783-92, 154 P.3d 873 (2007) (holding that the three definitions of common law assault are not alternative means, and, therefore, the State was not required to present substantive evidence supporting each definition).

Even assuming Martinez's alternative means argument is correct, this claim would fail. Where the evidence is insufficient to support one alternative means, the verdict may be affirmed if the reviewing court can determine that the verdict was based on only one of the alternative means and that substantial evidence

³⁸ Veteta-Contreras has adopted the arguments on this issue in Martinez's brief. Veteta-Contreras Notice to Adopt Argument of Co-Appellant.

supported that alternative means. State v. Fleming, 140 Wn. App. 132, 136-37, 170 P.3d 50 (2007), disapproved of on other grounds by State v. Mendoza, 165 Wn.2d 913, 929, 205 P.3d 113 (2009); State v. Johnson, 132 Wn. App. 400, 410, 132 P.3d 737 (2006).

A reviewing court can make this determination where the trial record clearly indicates that there was no evidence of one alternative means and the jury's special verdict form clearly indicates that the jury convicted only on the remaining means supported by substantial evidence. State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 786-87, 154 P.3d 873 (2007).

Based upon the record in this case, there can be no doubt that the jury based its verdict on Count I on the display of the machete. First, there was no evidence that a firearm was used during the robbery; Flores-Cruz testified that no firearm was displayed, and the prosecutor never argued or suggested that the verdict on Count I could be based upon the display of an apparent firearm. More importantly, by special verdict on Count I, the jury found unanimously that the defendants were armed with a deadly weapon, the machete, during the commission of the robbery.

CP(M) 361. The record establishes there was substantial evidence to support the defendants' convictions on Count I.

9. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

The defendants claim that the prosecutor committed misconduct in rebuttal argument by vouching for Monetti's innocence during closing argument. Brief of Appellant Martinez at 68-72.³⁹ This argument is without merit. During closing argument, both defense counsel argued that Monetti had committed the crimes. Replying to these arguments, the prosecutor properly discussed the testimony about Monetti that rebutted these assertions. Contrary to Martinez's characterization, the prosecutor did not argue that he possessed evidence, not presented to the jurors, that established Monetti's innocence.

The law governing this claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. Warren, 165 Wn.2d at 26. To establish prejudice, the defendant must show a substantial likelihood that the

³⁹ Veteta-Contreras has adopted the arguments on this issue in Martinez's brief. Veteta-Contreras Notice to Adopt Argument of Co-Appellant.

instances of misconduct affected the jury's verdict. Stenson, 132 Wn.2d at 718-19. "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Even improper remarks by the prosecutor are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his statements. State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006).

"Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense counsel's failure to object to the remarks at the time that they were made strongly suggests to a court that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. 157 Wn.2d at 53 n.2.

Martinez argues that during rebuttal argument the prosecutor "argue[d] that his office only charges the people who are guilty and that he could not charge Monetti because Monetti had not committed any crime." Brief of Appellant Martinez at 71. A review of the argument does not support Martinez's characterization. The argument was focused on the evidence and was a pertinent reply to the arguments made by the defendants in closing argument.

As noted above, both defense counsel argued in closing that Monetti was involved in the crimes and had lied in his testimony. RP 1529-31, 1563-72. Discussing Monetti's testimony, Veteta-Contreras's counsel stated that "[t]he State didn't even mention it in their closing. I'm not even sure if they believed it anymore." RP 1568. He discussed the immunity agreements and asked, "Why would he need immunity if he wasn't involved at all?" RP 1572.

In rebuttal, the prosecutor addressed the comments about Monetti, stating that "[m]y case isn't resting on Martin Monetti." RP 1580. The prosecutor referred to Monetti as "a clown." RP 1580. The prosecutor then discussed the testimony of the various witnesses and argued that none of them had identified Monetti as having been the man with the gun or the man with the

machete. RP 1583-85. The prosecutor then responded to the issue of immunity, and, in the challenged comments, stated:

PROSECUTOR: Whatever [Monetti] was doing it wasn't great. It's not a great taste in my mouth to give the guy immunity, but what are we going to charge him with? Being a drunken idiot?

MR. FLORA: Objection, Your Honor. Testifying.

THE COURT: Overruled.

PROSECUTOR: Are we going to charge him with being stupid? Charge him with hanging out? Charge him with lying about how many feet he was away? No. We charge the people -- well, there's evidence that he's the one that held the machete, and that evidence is everybody that saw him holding the machete.

RP 1585.

There is nothing improper about this argument. The defense clearly invited the discussion of Monetti and the immunity agreement, having argued that Monetti had committed the crimes and having raised questions about the immunity agreement. The prosecutor was entitled to respond to these arguments.

Martinez's characterizations of the prosecutor's argument on appeal are inaccurate. The prosecutor never stated that "his office only charges people who were guilty." And the prosecutor never stated that he knew more than the jury did about Monetti's

involvement. Instead, the prosecutor properly discussed the evidence and the witnesses' testimony relating to Monetti's involvement. RP 1580-85.

Moreover, Martinez's objections to the argument now made on appeal were not made below. At trial, his objection was that the prosecutor was "testifying" when he stated, "It's not a great taste in my mouth to give the guy immunity, but what are we going to charge him with? Being a drunken idiot?" RP 1585. He made no further objection to any of the argument, nor did he claim that the prosecutor was vouching. Even if the prosecutor's comment could be construed as improper, Martinez has not shown that the comment was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. This claim should be rejected.

10. VETETA-CONTRERAS'S CONVICTIONS FOR ATTEMPTED FIRST-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY.

Veteta-Contreras claims that his convictions for attempted first-degree robbery and second-degree assault violate double

jeopardy. He argues that because the second-degree assault elevated the robbery to first degree, the doctrine of merger requires vacation of the assault conviction. This Court should reject this claim. As the case was charged and proved, the State was not required to prove that Veteta-Contreras committed second-degree assault in order to elevate attempted robbery to attempted first-degree robbery.

At sentencing, the prosecutor conceded that Veteta-Contreras's convictions for attempted first-degree robbery and second-degree assault constituted the same criminal conduct. RP(sentencing) 4-5; CP(V-C) 155. The prosecutor did not ask the court to impose any confinement time for the second-degree assault conviction, except for the 12-month deadly weapon enhancement.⁴⁰ Id.; CP(V-C) 155, 163. Veteta-Contreras's counsel agreed with the State's representations about the standard ranges and enhancements. RP(sentencing) 7. The trial court found that the second-degree assault conviction was the same

⁴⁰ The prosecutor's failure to recommend any confinement time for the second-degree assault conviction, other than the sentence enhancement, was error. When current convictions constitute the "same criminal conduct" under the Sentencing Reform Act, the proper treatment is to score the convictions as one crime and run their sentences concurrently. RCW 9.94A.589(1)(a). As a practical matter, the failure to impose a sentence term on the second-degree assault conviction had no effect on the length of the sentence that Veteta-Contreras will serve.

criminal conduct as the first-degree robbery conviction, and did not impose sentence on the assault conviction, other than the deadly weapon enhancement. CP(V-C) 95.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” Article I, section 9 of the Washington State Constitution provides that “[n]o person shall ... be twice put in jeopardy for the same offense.” The two clauses provide the same protection. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

Among other things, the double jeopardy clauses bar multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); Kelley, 168 Wn.2d at 76. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). If the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. Id. at 368.

The Washington Supreme Court has set forth a three-part test for determining whether multiple punishments were intended by the legislature. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005). First, the court examines the language of the relevant statutes to determine whether the legislation expressly permits or disallows multiple punishments. Id. at 771-72. Should this step not result in a definitive answer, the court then turns to the two-part "same evidence" or "Blockburger"⁴¹ test, which asks whether the offenses are the same "in law" and "in fact." Id. at 772. Finally, if applicable, the court considers the merger doctrine. Id. at 772-73.

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, the court presumes the legislature intended to punish both offenses through a greater sentence for the greater crime. Id. at 772-73. Even where the merger doctrine applies, both convictions may be allowed to stand if there is an independent purpose or effect to each. Id. at 773.

⁴¹ United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

In State v. Zumwalt, a case consolidated under State v. Freeman, the Supreme Court considered whether convictions for first-degree robbery and second-degree assault violated double jeopardy under the merger doctrine. Freeman, 153 Wn.2d at 778-80. Zumwalt was charged with both crimes after he punched the victim in the face and robbed her. Id. at 770. The first-degree robbery charge was based upon the infliction of bodily injury alternative means, and the second-degree assault charge was based upon the reckless infliction of bodily harm alternative means. State v. Zumwalt, 119 Wn. App. 126, 131, 82 P.3d 672 (2003), aff'd sub nom. State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). The only facts that elevated the robbery to first degree also established the separate assault charge. Id. at 132. The Supreme Court concluded that the two convictions merged for double jeopardy purposes because "as charged and proved, without the conduct amounting to assault, Zumwalt would have been guilty of only second degree robbery." 153 Wn.2d at 778. The Court, however, refused to adopt a per se rule, and held that whether the merger doctrine applied would be decided on a case-by-case basis. Id. at 778-80.

Since Freeman, this Court has addressed whether attempted first-degree robbery and second-degree assault violate double jeopardy under the merger doctrine. In State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), Beaver and an accomplice had entered a jewelry store, pointed their guns at the customers and store employees, and announced that it was a robbery. When a jeweler emerged from his office, Beaver pointed his gun at him. Id. at 57-58. Beaver was convicted of attempted robbery in the first degree and assault in the second degree. Id. at 58.

On appeal, Beaver claimed that these convictions violated double jeopardy. This Court rejected that claim, observing that "the State was not required to prove Beaver committed the crime of second degree assault in order to elevate the attempted robbery to attempted first degree robbery." Id. at 66.

Because the robbery involved that alleged use of a firearm, the State only had to prove that Beaver was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon. Here, it was charged and proved that Beaver was armed with a deadly weapon, therefore elevating the attempted robbery to first degree attempted robbery. Since it was unnecessary under the facts of this case for the State to prove that Beaver engaged in conduct amounting to second degree assault in order to elevate his robbery conviction, and because the State did prove conduct not amounting to second degree assault that elevated Beaver's attempted robbery

conviction, the merger doctrine does not prohibit Beaver's conviction for both attempted first degree robbery and second degree assault.

Id. at 66 (footnote omitted).

The court distinguished Freeman because of the different way the crimes were charged and proved at trial. "As charged and proved, Zumwalt was guilty of first degree robbery because he inflicted bodily injury (assaulted) the victim in furtherance of the robbery. In short, under the facts of the case, the State was required to prove that Zumwalt engaged in conduct amounting to second degree assault in order to elevate his robbery conviction to first degree robbery." Id. at 65-66.

The Washington Supreme Court subsequently discussed and approved of the analysis in Esparza:

There, Division One of the Court of Appeals held that a person convicted of attempted first degree robbery under the "[d]isplays what appears to be a firearm or other deadly weapon" prong of the robbery statute and second degree assault under the "[a]ssaults another with a deadly weapon" prong of the assault statute arising out of the same incident can permissibly be punished for having committed both offenses, thus distinguishing Zumwalt. RCW 9A.56.200(1)(a)(ii); RCW 9A.36.021(1)(c).

Importantly, the elevated charge at issue in Esparza was attempted first degree robbery. Proof of an attempted robbery requires only proof of intent to commit robbery and a substantial step toward

carrying out that intent. RCW 9A.28.020(1). The Court of Appeals recognized that any number of actions proved at Esparza's trial constituted a substantial step toward the attempted robbery and thus, the assault was not necessary to elevate the charge to first degree.

State v. Kier, 164 Wn.2d 798, 806-07, 194 P.3d 212 (2008).

Under Esparza and Kier, Veteta-Contreras's double jeopardy claim fails. As the case was charged and proved, the State was not required to prove that Veteta-Contreras committed the second-degree assault in order to elevate the attempted robbery to attempted first-degree robbery. As in Esparza, the attempted first-degree robbery was based upon the "displayed what appears to be a firearm or other deadly weapon" alternative means. In order to elevate the crime of robbery, the State had to prove that Veteta-Contreras (or his accomplice) displayed what appeared to be a deadly weapon during the robbery. Unlike the case in Zumwalt, where the robbery was based upon an alternative means that required an assault, the act that constituted the second-degree assault, in this case, Veteta-Contreras's act of hitting Duran-Acosta in the back with the machete was not necessary to elevate the attempted robbery.

Though it is directly on point and is discussed in some of the cases that he does cite, *Veteta-Contreras* does not cite or discuss *Esparza*. Instead, he cites *Freeman* and *In re Francis*, 170 Wn.2d 517, 242 P.3d 866 (2010). As noted above, *Freeman* is distinguishable because of the manner in which the robbery charge was pled and proved. Similarly, in *Francis*, the attempted first-degree robbery charge was based upon the alternative means that Francis inflicted bodily injury upon the victim. *Id.* at 524. The court held that the merger doctrine applied because "Francis' second degree assault conduct was also charged as an element of the first degree robbery charge." *Id.* at 524. The court acknowledged that its holding would have been different had the State charged the attempted robbery based upon a different alternative means:

The State also argues the second degree assault conduct need not be part of the attempted first degree robbery charge because Francis was armed with and/or displayed a deadly weapon (a baseball bat) in his attempt, and thus his attempted robbery is alternatively elevated to the first degree pursuant to RCW 9A.56.200(1)(a)(i) and (ii). But again, the State didn't charge Francis with attempted first degree robbery based upon those alternative grounds, but rather based upon the infliction of bodily injury, RCW 9A.56.200(1)(a)(iii). The State has great latitude and discretion when it chooses what it will charge a defendant. But once the State has charged the

defendant, short of a timely amendment, the State is stuck with what it chose.

Id. at 527.

The court distinguished Esparza based on this same ground:

Esparza held that when the State charges a defendant with an attempt crime *but does not specify what the substantial step is*, for double jeopardy analysis, the court need not assume the assault conduct is the substantial step when other conduct would also satisfy that requirement. *Id.* at 61-64, 143 P.3d 612. But here the State charged Francis with *specific* conduct—inflicting bodily injury on Jacobsen—to satisfy the statutory element to raise the attempted robbery to the first degree. See RCW 9A.56.200(1)(a)(iii). The second degree assault conduct is inseparable from the attempted first degree robbery *as it was charged*.

Id. at 526 n.5 (emphasis in original). Francis is consistent with Esparza and Kier and does not support Veteta-Contreras's double jeopardy claim.

Veteta-Contreras argues that the merger doctrine applies because "[t]he basis for attempted first degree robbery was the use or threat to use immediate force, violence or fear of injury by means of a machete -- the same conduct forming the basis for second degree assault." Brief of Appellant Veteta-Contreras at 65. The obvious flaw in this argument is that "the use or threat to use immediate force, violence or fear of injury" did not elevate the

attempted robbery to attempted first-degree robbery. In fact, the use or threat to use force is an element of attempted second-degree robbery. RCW 9A.56.190; RCW 9A.56.210. Because this element is present in all robbery charges, under Veteta-Contreras's logic, convictions for second-degree assault and first-degree robbery would always violate double jeopardy. His position is inconsistent with the holdings in Freeman, Kier, Francis and Esparza.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendants' convictions and sentences.

DATED this 13th day of March, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to:

Casey Grannis, the attorney for the appellant Veteta-Contreras, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, and

James Lobsenz, the attorney for the appellant Martinez, at Carney Badley Spellman, 701 Fifth Avenue, Suite 3600, Seattle, WA 98104,

containing a copy of the BRIEF OF RESPONDENT, in STATE V. VETETA-CONTRERAS AND MARTINEZ, Cause No. 66658-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

3/13/12
Date