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DIVISION II

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STATE OF WASHINGTON

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NO. 40467-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

CASANOVA R. F. ESCOBANO,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Christine Pomeroy, Judge

Cause No. 09-1-01501-9

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Escobano the statutory affirmative defense of uncontrollable circumstances to the charge of bail jumping (Count II) where the plain language of RCW 9A.76.170(2) entitled him to the defense or in the alternative whether the statute is ambiguous as to what constitutes "...surrender[ing] as soon as such circumstances cease to exist" and under the rule of lenity Escobano was entitled to this defense.
2. The trial court erred in failing to instruct the jury on the statutory affirmative defense of uncontrollable circumstances pursuant to RCW 9A.76.170(2) on the charge of bail jumping (Count II) over Escobano's objection as he was entitled to this defense.
3. The trial court erred in failing to take the case from the jury for lack of sufficient evidence to find Escobano guilty of assault in the second degree (Count I).
4. The trial court erred in finding that Count I (assault in the second degree) involved domestic violence over Escobano's objection at sentencing and imposing a \$100 domestic violence assessment as well as ordering a domestic violence no contact order where the jury was never instructed to nor did it determine by special verdict that the crime was against a family or household member necessary for a domestic violence finding.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Escobano the statutory affirmative defense of uncontrollable circumstances to the charge of bail jumping (Count II) where the plain language of RCW 9A.76.170(2) entitled him to the defense or in the alternative whether the statute is ambiguous as to what constitutes "...surrender[ing] as soon as such circumstances cease to exist" and under the rule of lenity Escobano was entitled to this defense? [Assignment of Error No. 1].

2. Whether the trial court erred in failing to instruct the jury on the statutory affirmative defense of uncontrollable circumstances pursuant to RCW 9A.76.170(2) on the charge of bail jumping (Count II) over Escobano's objection as he was entitled to this defense? [Assignment of Error No. 2].
3. Whether there was sufficient evidence elicited at trial to find Escobano guilty of assault in the second degree (Count I)? [Assignment of Error No. 3].
4. Whether the trial court erred in finding that Count I (assault in the second degree) involved domestic violence over Escobano's objection at sentencing and imposing a \$100 domestic violence assessment as well as ordering a domestic violence no contact order where the jury was never instructed to nor did it determine by special verdict that the crime was against a family or household member necessary for a domestic violence finding? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Casanova R. F. Escobano (Escobano) was charged by fourth amended information filed in Thurston County Superior Court with one count of assault in the second degree (strangulation)—domestic violence (Count I), and one count of bail jumping (Count II). [CP 14].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. A bench warrant was issued on October 19, 2009, when Escobano failed to appear for a preliminary hearing. [10-19-09 RP 3]. Escobano again failed to appear on October 20, 2009, after apparently attempting to turn

himself in to authorities. [10-20-09 RP 4; 10-29-09 RP 3]. Escobano next appeared before the court on November 4, 2009. [11-4-09 RP 4-5].

Escobano was tried by a jury, the Honorable Christine Pomeroy presiding. [RP 5-329]. The court gave Escobano's proposed instruction on self defense to the charge of assault in the second degree (Count I) over the State's exception and Escobano took exception to the court's failure to give his proposed instruction on uncontrollable circumstances the statutory affirmative defense to bail jumping (Count II). [CP 34-36, 37-39, 40-41, 44-60; RP 254-258]. The jury found Escobano guilty as charged of assault in the second degree (Count I) and bail jumping (Count II). [CP 61, 62; RP 318-322]. The jury was not instructed to determine nor did it enter a special verdict finding that the assault in the second degree (Count I) was committed against a family or household member for a domestic violence finding.

The court sentenced Escobano, who had no prior convictions, to a standard range sentence of 6-months on Count I (assault in the second degree) and to a standard range sentence of 6-months on Count II (bail jumping) based on an offender score of 1 for a total sentence of 6-months. [CP 63-65, 77-84; 3-23-10 RP 8-11]. The court over Escobano's objection found that the assault involved a domestic violence situation

ordering \$100 for domestic violence assessment and entering a domestic violence no contact order. [CP 77-84; 3-23-10 RP 6-10].

A notice of appeal was timely filed on March 23, 2010. [CP 66-74]. This appeal follows.

2. Facts

On September 15, 2009, Brenna Youckton (Youckton) invited Escobano, her close friend and former roommate, for a visit to her apartment in Thurston County. [RP 29-31, 33-34]. Youckton drove to Parkland, picked up Escobano, and returned to her apartment where Escobano stayed the night. [RP 34-36]. The next night, September 16, 2009, after getting off work, Youckton stopped at the grocery store forgetting to buy beef jerky that Escobano had requested to his annoyance, made dinner, watched TV with Escobano, went to Staples with him, and upon returning Youckton went to bed leaving Escobano in the living room talking on his cell phone. [RP 37-41]. Escobano was talking so loud that Youckton could not sleep so she called him asking him to speak more quietly. [RP 41-42]. Escobano asked Youckton to drive him to Lakewood with Youckton initially refusing but then agreeing to do. [RP 42-43]. Youckton, who was annoyed and whose feelings were hurt, went out to the living room to tell Escobano what she was feeling, but he ignored her. [RP 44]. The two began arguing with Youckton refusing to drive

Escobano to Lakewood with Escobano eventually telling Youckton that he was leaving that he was done with her and that she was a “psycho.” [RP 45-47]. Youckton asked Escobano to leave. [RP 47]. Escobano left Youckton’s apartment and continued to talk on his cell phone outside. [RP 48-49]. Youckton gathered up Escobano’s belongings and took them out of her apartment to Escobano. [RP 48-49]. As Youckton was returning to her apartment, Escobano shoved her from behind and took her back into her apartment. [RP 50-52]. The two began arguing and the argument became physical with Youckton pushing and scratching Escobano and with Escobano putting his hands around Youckton’s throat squeezing so hard that she saw stars and couldn’t breathe. [RP 52-63]. Eventually, Escobano let Youckton go and she called 911 (the recording of the 911 call was played to the jury without objection). [Ex. No 16; CP 26-33; RP 23-27, 64-70, 73-75, 78]. According to Youckton, Escobano tried to get her to hang up on the 911 operator and when she didn’t he left her apartment. [RP 69-70]. Youckton admitted on cross-examination that she was hurt that Escobano was ignoring her and talking on the phone to other people, particularly a woman. [RP 80-86]. Youckton also admitted that the two had oral sex before they began arguing which argument ended in a physical altercation. [RP 87-89, 95-97].

The police arrived and spoke with both Youckton and Escobano after which Escobano was arrested. [RP 105, 108-110, 117, 122, 125-130].

John "Jack" Jones, a Thurston County Deputy Prosecuting Attorney, testified that on September 29, 2009, Escobano, having made bail, was arraigned and an order was entered in Escobano's case that required his appearance in court on October 19, 2009. [Ex. No. 8; RP 137, 141-146, 150-155, 159-160]. Escobano did not appear on October 19, 2009, and a bench warrant was ordered to be issued. [RP 155-157]. Nor did Escobano appear on October 20, 2009, at a hearing schedule to address his failure to appear the prior day. [RP 161-164]. Escobano was surrendered to the sheriff's office by his bail bond company on November 2, 2009, and appeared before the court on November 4, 2009. [RP 167-170, 174].

Troy Thurmon (Thurmon), Escobano's friend, testified that Youckton called him, telling him what had happened, that she wanted to see Escobano, and that she would throw out Escobano's belongings if he didn't come and get them. [RP 176-180, 181-182]. According to Thurmon, Youckton also told him she would drop the charges against Escobano if Escobano would give her a public apology in person. [RP 179-180, 183].

Escobano testified in his own defense. Escobano testified that Youckton had invited him to her apartment, she had picked him up and brought him to her apartment where he spent the night, and the next evening after they had dinner that she wanted to talk about their relationship—a conversation he wanted to avoid. [RP 187-192]. He wasn't interested in Youckton as a girlfriend. [RP 192-193]. Escobano denied any sexual contact between Youckton and himself on that evening. [RP 253]. Escobano took a phone call from a friend (Catalina) and Youckton began yelling at him going crazy. [RP 193-196]. Escobano decided to leave and went outside whereupon Youckton began throwing his belongings out of the apartment. [RP 196-199]. Escobano went back into the apartment where Youckton got madder grabbing at his cell phone and the two eventually got tangled up on the floor. [RP 204-208]. Escobano told Youckton that she was “f-ing crazy,” and she responded by saying she would call the police, which Youckton did. [RP 208-210]. Escobano went outside to wait for the police to arrive. [RP 210-212]. When the police did arrive, he was arrested. [RP 212-213]. Escobano denied choking Youckton. [RP 245-246].

Escobano admitted that he did not appear in court on October 19, 2009, as required because he had an appearance in another court in Kitsap County on the same date. [RP 213-214, 220-221]. Escobano testified that

he tried calling the Thurston County court to explain the problem and that the problem was compounded by the fact that he had to take a bus from his home in Bellevue as he doesn't drive to both court appearances. [RP 214]. Escobano was told to talk to the other court (Kitsap County). [RP 214]. On October 19, 2009, Escobano tried to make both appearances by going to the Kitsap County appearance first as that appearance was scheduled earlier for 8:30 AM. [RP 214-216]. Upon arriving at the Kitsap County court, he was told that there was no Escobano scheduled to appear that day so he was free to leave. [RP 215-216]. On the Kitsap County docket there was a hearing scheduled for a Roland Lattimore, a name associated with Escobano's father that Escobano has used but Escobano was unaware that Kitsap County was using in reference to his case there. [RP 215, 219-220, 222-225]. At approximately 10 AM, Escobano called the Thurston County court to explain that he would be late and that he was trying to get a shuttle bus to Thurston County, but was told he was too late for his hearing in Thurston County and that he should come and appear the following day. [RP 216-217].

Escobano testified that on October 20, 2009, he went to Thurston County court as he had been told to do the previous day, was directed to the police department, explained to the police what happened, gave his contact information, and was told he would be called about when he

needed to show up for court to address the matter. [RP 217-219, 225-226]. He was never called. [RP 226]. Escobano turned himself in through his bail bondsman. [RP 226-227].

D. ARGUMENT

- (1) THE PLAIN LANGUAGE OF RCW 9A.76.170(2), THE STATUTORY AFFIRMATIVE DEFENSE OF UNCONTROLLABLE CIRCUMSTANCES TO BAIL JUMPING, ENTITLED ESCOBANO TO THIS DEFENSE OR IN THE ALTERNATIVE THE STATUTE IS AMBIGUOUS AS TO WHAT CONSTITUTES "...SURRENDER[ING] AS SOON AS SUCH CIRCUMSTANCES CEASED TO EXIST" WITH THE RESULT THAT UNDER THE RULE OF LENITY ESCOBANO'S CONVICTION FOR BAIL JUMPING MUST BE REVERSED AS HE WAS DEPRIVED OF HAVING THE JURY INSTRUCTED ON THIS DEFENSE.

When interpreting a statute, the court must give effect to the plain meaning of the statutory language. State v. Radan, 98 Wn. App. 652, 657, 990 P.2d 962 (1999); State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). A court may not engage in statutory construction if the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court's notions of what is good policy, recognizing the principle that "drafting of a statute is a legislative, not judicial function." State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court's goal in statutory interpretation is to identify and give effect to the

Legislature's intent, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), *review denied*, 145 Wn.2d 1013 (2001); if the language of a statute is unambiguous, the language of the statute is not subject to judicial interpretation. Id. Language is unambiguous when it is not susceptible to two or more interpretations. State v. Delgado, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003). When the legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002). Under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App. at 358. The meaning of a statute is a question of law reviewed de novo. Dep't. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

In the instant case, Escobano sought to have the jury instructed on the statutory affirmative defense of uncontrollable circumstances to the charge of bail jumping (Count II) pursuant to RCW 9A.76.170(2), but the court declined to give his proposed instruction stating the elements of the defense had not been met. [CP 40-41; RP 257].

RCW 9A.76.170(2) provides:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the

creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

The plain language of the statute indicates three requirements before a defendant is entitled to the defense: 1) an uncontrollable circumstance, defined in RCW 9A.76.010(4), prevented appearance; 2) that the defendant did not create the circumstance; and 3) that the defendant surrendered as soon possible after the uncontrollable circumstance ceased.

What constitutes “surrender” (or for that matter to whom a person must “surrender”) for purposes of this statutory affirmative defense is not defined.

According to Merriam-Webster’s Collegiate Dictionary, 11th ed. (2004), “surrender” is defined as follows:

- 1a: to yield to the power, control, or possession of another upon compulsion of demand
- b: to give up completely or agree to forgo esp. in favor of another

- 2a: to give (oneself) up into the possession of another esp. as a prisoner
- b: to give (oneself) over to something (as in influence) *vi*: to give oneself up into the power of another: YIELD *syn*: see RELINQUISH.

Under this definition, the act of yielding or relinquishing to another is what constitutes “surrender.”

The evidence presented at trial established all three requirements for the giving of the uncontrollable circumstances defense to bail

jumping—Escobano could not physically be in two courts at the same time (an uncontrollable circumstance); the respective courts scheduled the hearings (Escobano did not create the uncontrollable circumstance); and Escobano immediately contacted Thurston County on October 19th about being late to his scheduled hearing and went to Thurston County contacting the police department on October 20th as directed (he “surrendered” as soon as the uncontrollable circumstance ceased to exist by do exactly what he was directed and yielding to the authority of the police department in taking his contact information then being informed he would be called regarding his failure to appear on October 19th).

The plain unambiguous language of RCW 9A.76.170(2) indicates that Escobano “surrendered” as required and was entitled to the statutory affirmative defense of uncontrollable circumstances. This court should reverse Escobano’s conviction for bail jumping as he was not afforded a defense to which he was entitled.

In the alternative, RCW 9A.76.170(2) is ambiguous should this court find that what constitutes “surrender” for purposes of this statutory affirmative defense requires more than the defendant yielding to authority and following that authority’s directions, .i.e. being taken into custody or appearing before a court. If so, then it appears that RCW 9A.76.170(2) is capable of more than one meaning, and an ambiguity exists, which under

the rule of lenity, must be resolved in favor of Escobano. *See State v. Spandel, supra*. Escobano was entitled to have the jury instructed on the statutory affirmative defense to bail jumping of uncontrollable circumstances. This court should reverse Escobano's conviction for bail jumping (Count II).

- (2) ESCOBANO WAS ENTITLED TO THE STATUTORY AFFIRMATIVE DEFENSE OF UNCONTROLLABLE CIRCUMSTANCES PURSUANT TO RCW 9A.76.170(2) ON THE CHARGE OF BAIL JUMPING (COUNT II) AND THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THIS DEFENSE OVER ESCOBANO'S OBJECTION.

A trial court must give an instruction on a party's theory of the case if the law and evidence support the instruction. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witness' credibility, which are exclusively functions of the jury." *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). The court's failure to give such an instruction constitutes reversible error. *State v. Otis*, 151 Wn. App. at 578.

"Uncontrollable circumstances" is a statutory affirmative defense to bail jumping under RCW 9A.76.170(2). RCW 9A.76.170(2) provides:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Simply stated in order for the jury to be instructed on this defense, a defendant must establish three things: 1) an uncontrollable circumstance prevented appearance; 2) that the defendant did not create the circumstance; and 3) that the defendant surrendered as soon possible.

In the instant case, Escobano was charged in Count II with bail jumping. [CP 14]. The evidence presented at trial established that Escobano did not appear on October 19, 2009, for a preliminary hearing in Thurston County. [RP 155-157]. In fact, Escobano admitted that he did not appear at the preliminary hearing in Thurston County on October 19, 2009. [RP 213-214, 220-221].

However, the evidence presented at trial establishes that Escobano also had a court appearance in Kitsap County on the same date under the name of Roland Lattimore. [RP 213-216, 219-222]. It would be physically impossible, particularly as Escobano relied upon public transport as he did not drive, to appear in both courts on the same date at the same time—an uncontrollable circumstance that Escobano did not create.

Moreover, Escobano testified that he contacted Thurston County on October 19, 2009, to explain why he was late and that he was on his way to Thurston County only to be told he was too late and he should come to court the next day. [RP 216-217]. Escobano further testified that on October 20, 2009, he did in fact appear in Thurston County to surrender, was directed to the police department, explained to the police what had happened, gave his contact information, was told he would be called when he needed to show up for court to address the matter, but he was never called nor was he taken into custody. [RP 217-219, 225-226]. The State presented no evidence refuting Escobano's contact with Thurston County on October 19, 2009, or his appearance in Thurston County on October 20, 2009 to surrender. Escobano's contact with Thurston County on October 19, 2009 and appearance in Thurston County on October 20, 2009, establish that Escobano "surrendered" immediately after he was free of the Kitsap County appearance—he surrendered as soon as the uncontrollable circumstance ceased to exist.

Based on these facts, Escobano proposed the following instruction:

It is an affirmative defense to a prosecution for bail jumping if uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

[CP 40-41]. The court declined to give Escobano's proposed instruction on uncontrollable circumstances over his exception by stating:

But I will not give the affirmative defense for the prosecution of bail jumping. I believe the elements have not been met.

[RP 257]. In so holding, the court failed to identify its reasoning as to why the elements of the affirmative defense had not been met.

Absent valid reasoning to the contrary, this record, when viewed in the light most favorable to Escobano, establishes all three requirements for the giving of the uncontrollable circumstances defense to bail jumping— Escobano could not physically be in two courts at the same time (an uncontrollable circumstance); the respective courts scheduled the hearings (Escobano did not create the uncontrollable circumstance); and Escobano immediately contacted Thurston County on October 19th about being late and went to Thurston County on October 20th as directed (he “surrendered” as soon as the uncontrollable circumstance ceased to exist). Escobano was entitled to the affirmative defense of uncontrollable circumstances to the charge of bail jumping (Count II). The trial court erred in failing to instruct the jury on this defense. This court should reverse Escobano's conviction for bail jumping.

(3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT ESCOBANO WAS GUILTY OF ASSAULT IN THE SECOND DEGREE (COUNT I).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Escobano was charged and convicted of assault in the second degree—strangulation (Count I). [CP 14, 61]. As instructed in Instruction No. 10, the State bore the burden of proving beyond a reasonable doubt the following:

(1) That on or about September 16, 2009, the defendant intentionally assaulted BRENNA YOUCKTON by strangulation; entered or remained unlawfully in a building;

(2) That this act occurred in the State of Washington.

[CP 55]. The court also instructed the jury on the lawful use of force (self defense) in Instruction No. 12, which instruction required that the State bear the burden of proving beyond a reasonable doubt that Escobano's use of force against Youckton was not lawful. [CP 57].

As instructed in order to sustain Escobano's conviction for assault in the second degree--strangulation, the State bore the burden of proving beyond a reasonable doubt not only that Escobano assaulted Youckton by strangulation but that he was not lawfully defending himself. This is a burden the State cannot meet.

The sum of the State's evidence to prove this crime was the testimony of Youckton that Escobano attacked her by choking her so that she couldn't breathe and was seeing stars after she had asked Escobano to leave her apartment and removed his belongings from her apartment. However, Youckton's testimony that it was Escobano who attacked her is called into question when considering the fact that she admitted that she wanted to deepen her relationship with Escobano to that of boyfriend and girlfriend and Escobano wasn't interested, and the fact that she admitted to being hurt that he was ignoring her and talking on the phone to another

woman. Youckton also claimed that she and Escobano had engaged in oral sex before they began fighting and Escobano choked her, which Escobano denied. Moreover, Escobano testified that it was Youckton who escalated their verbal argument to a physical confrontation when he rejected her desire for a romantic relationship; he was defending himself from Youckton. Her accusation of assault by accusation could have been the product of her jealousy in light of Escobano's rejection. Based on the totality of these facts, there was insufficient evidence elicited at trial to establish that Escobano was guilty of assault in the second degree—strangulation.

This court should reverse and dismiss this conviction.

- (4) THE TRIAL COURT ERRED IN FINDING COUNT I (ASSAULT IN THE SECOND DEGREE) INVOLVED DOMESTIC VIOLENCE OVER ESCOBANO'S OBJECTION AT SENTENCING AND IMPOSING A \$100 DOMESTIC VIOLENCE ASSESSMENT AS WELL AS ORDERING A DOMESTIC VIOLENCE NO CONTACT ORDER WHERE THE JURY WAS NEVER INSTRUCTED TO NOR DID IT DETERMINE THAT THE CRIME WAS AGAINST A FAMILY OR HOUSEHOLD MEMBER NECESSARY FOR A DOMESTIC VIOLENCE FINDING.

The due process clause of the Fourteenth Amendment requires the State to prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The same is true for sentence enhancements. State v. Recuenco, 163 Wn.3d 428, 180 P.3d 1276 (2008).

Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation, which triggers the enhanced penalty.

State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995), *quoting* State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588, *review denied*, 117 Wn.2d 1025, *review denied*, 117 Wn.2d 1026, 820 P.2d 510 (1991). “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004) (*quoting* Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed 2d 435 (2000)).

In the instant case, the State charged Escobano in Count I with assault in the second degree by strangulation also alleging that the crime involved domestic violence pursuant to RCW 10.99.020(3) and (5). [CP 14]. The jury returned a general verdict on Count I stating, “We, the jury, find the defendant, CASANOVA ROLONDO F. ESCOBANO, Guilty of the crime of ASSAULT IN THE SECOND DEGREE as charged in Count I.” [CP 61]. At sentencing over Escobano’s objection, the court found that Count I involved domestic violence and imposed a \$100 domestic

violence assessment as well as ordered a domestic violence no contact order. [CP 77-84; 3-23-10 RP 6-10].

RCW 10.99.020 provides in pertinent part:

- (3) “Family or household members” means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.
- (5) “Domestic violence” includes but is not limited to any of the following crimes when committed by one family or household member against another:
 - (b) Assault in the second degree (RCW 9A.36.021).

Here, the jury was never instructed or asked to enter a special verdict finding that Count I (assault in the second degree—strangulation) was committed against a “family or household member,” which would have triggered the domestic violence designation and its sentencing implications. Absent a finding by the jury beyond a reasonable doubt that this count involved domestic violence as it was committed against a “family or household member,” the domestic violence designation found by the court with the resulting sentencing implications was error. *See Appendi, supra*. This court should remand for resentencing with

directions to remove the domestic violence designation and the sentencing implications on Count I.

E. CONCLUSION

Based on the above, Escobano respectfully requests this court to reverse and dismiss his convictions and/or remand for resentencing.

DATED this 11th day of October 2010.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11th day of October 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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(and the transcript)

Signed at Tacoma, Washington this 11th day of October 2010.

Patricia A. Pethick
Patricia A. Pethick

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