

COA NO. 66658-4-1

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

**REC'D**  
**JAN 13 2012**  
**King County Prosecutor**  
**Appellate Unit**

STATE OF WASHINGTON,

Respondent,

v.

HECTOR VETETA-CONTRERAS,

Appellant.

**FILED DIV 1**  
**COURT OF APPEALS**  
**STATE OF WASHINGTON**  
**2012 JAN 13 PM 4:12**

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

The Honorable Ronald Kessler, Judge

BRIEF OF APPELLANT

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## TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	2
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Procedural History</u> .....	3
2. <u>Trial</u> .....	4
a. The Flores-Cruz Incident .....	4
b. The Duran/Lopez-Pando Incident.....	8
c. Martin Monetti And Other Men At the Scene .....	11
d. Police Intervention and Aftermath.....	16
C. <u>ARGUMENT</u> .....	23
1. THE ATTEMPTED FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS MUST BE REVERSED BECAUSE THE COURT WRONGLY DECLINED TO INSTRUCT THE JURY ON LESSER OFFENSES. ....	23
2. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE OFFENSE OF ROBBERY AND COUNSEL WAS INEFFECTIVE IN AGREEING TO THE DEFECTIVE INSTRUCTION. ....	32
a. <u>It Is Error To Instruct The Jury On Uncharged            Alternative Means Of Committing The Offense.</u> ....	32

**TABLE OF CONTENTS (CONT'D)**

	Page
b. <u>Defense Counsel Provided Ineffective Assistance In Contributing To The Uncharged Alternative Means Error</u> .....	37
3. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE OFFENSE OF ATTEMPTED FIRST DEGREE ROBBERY AND COUNSEL WAS INEFFECTIVE IN AGREEING TO THE DEFECTIVE INSTRUCTION. ....	43
4. THE PROSECUTOR'S IMPROPER VOUCHING FOR THE STATE'S WITNESS VIOLATED VETETA- CONTRERAS'S RIGHT TO A FAIR TRIAL. ....	46
a. <u>The Prosecutor Committed Misconduct In Vouching For Witness Monetti</u> . ....	46
b. <u>The Prosecutor's Misconduct Requires Reversal</u> . ....	50
c. <u>Counsel Was Ineffective In Failing To Request Redaction Of The Immunity Agreements</u> .....	55
5. THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED AN ELEMENT OF THE CRIME OF FELONY HARASSMENT. ....	57

**TABLE OF CONTENTS (CONT'D)**

	Page
6. THE CONVICTION FOR SECOND DEGREE ASSAULT MUST BE VACATED ON DOUBLE JEOPARDY GROUNDS AND ITS ACCOMPANYING DEADLY WEAPON ENHANCEMENT MUST BE VACATED AS WELL. ....	61
a. <u>The Court And State Agreed Count III “Merged” With Count II But Still Treated Count II As Having Legal Effect</u> .....	62
b. <u>The Court Erred in Failing To Vacate The Assault Conviction Due To The Double Jeopardy Violation</u> .....	63
c. <u>The Court Erred in Failing To Vacate The Accompanying Deadly Weapon Enhancement</u> .....	67
D. <u>CONCLUSION</u> .....	70

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Francis,</u> 170 Wn.2d 517, 242 P.3d 866 (2010).....	64-66
<u>In re Pers. Restraint of Martinez,</u> 171 Wn.2d 354, 256 P.3d 277 (2011) .....	29
<u>In re Pers. Restraint of Richey,</u> 162 Wn.2d 865, 175 P.3d 585 (2008).....	44
<u>State v. Allen,</u> 161 Wn. App. 727, 753-56, 255 P.3d 784, <u>review granted,</u> 172 Wn.2d 1014, 262 P.3d 63 (2011).....	59
<u>State v. Atkins,</u> 156 Wn. App. 799, 236 P.3d 897 (2010).....	59
<u>State v. Bray,</u> 52 Wn. App. 30, 756 P.2d 1332 (1988).....	34-36, 39-41, 46
<u>State v. Brett,</u> 126 Wn.2d 136, 892 P.2d 29 (1995).....	51
<u>State v. Brown,</u> 169 Wn.2d 195, 234 P.3d 212 (2010).....	61
<u>State v. Case,</u> 49 Wn.2d 66, 298 P.2d 500 (1956).....	51
<u>State v. Charlton,</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	47
<u>State v. Chino,</u> 117 Wn. App. 531, 72 P.3d 256 (2003).....	34

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>WASHINGTON CASES</u> (Cont'd)	
<u>State v. Collicott</u> , 118 Wn.2d 649, 668, 827 P.2d 263 (1992).....	64
<u>State v. Crumble</u> , 142 Wn. App. 798, 177 P.3d 129 (2008).....	68
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	47
<u>State v. Dolan</u> , 118 Wn. App. 323, 73 P.3d 1011 (2003).....	49
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996).....	37-40, 43
<u>State v. Evans</u> , 96 Wn.2d 119, 634 P.2d 845, 649 P.2d 633 (1981).....	56
<u>State v. Feeser</u> , 138 Wn. App. 737, 158 P.3d 616 (2007).....	60
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	24-26, 31
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	50, 60
<u>State v. Frazier</u> , 76 Wn.2d 373, 456 P.2d 352 (1969).....	34
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	63-65

**TABLE OF AUTHORITIES** (CONT'D)

Page

WASHINGTON CASES (Cont'd)

<u>State v. Gohl</u> , 109 Wn. App. 817, 37 P.3d 293 (2001), <u>review denied</u> , 146 Wn.2d 1012 (2002) .....	67, 68
<u>State v. Ieremia</u> , 78 Wn. App. 751, 899 P.2d 16 (1995), <u>review denied</u> , 128 Wn.2d 1009, 910 P.2d 481 (1996) .....	25
<u>State v. Ish</u> , 170 Wn.2d 189, 241 P.3d 389 (2010).....	47-49, 55
<u>State v. Johnson</u> , 119 Wn.2d 143, 829 P.2d 1078 (1992).....	60
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004).....	57, 58, 60
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	57
<u>State v. Knight</u> , 162 Wn.2d 806, 174 P.3d 1167 (2008).....	66
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	37, 38
<u>State v. Lane</u> , 36 Wn.2d 227, 217 P.2d 322, <u>modified on other grounds</u> , 37 Wn.2d 145, 222 P.2d 394 (1950).....	36, 39, 42, 46
<u>State v. Laramie</u> , 141 Wn. App. 332, 169 P.3d 859 (2007).....	34

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>WASHINGTON CASES</u> (Cont'd)	
<u>State v. League</u> , 167 Wn.2d 671, 223 P.3d 493 (2009).....	66
<u>State v. Mannering</u> , 150 Wn.2d 277, 75 P.3d 961 (2003).....	24
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	57, 61
<u>State v. Mutch</u> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	63
<u>State v. Neidigh</u> , 78 Wn. App. 71, 95 P.2d 423 (1995).....	55
<u>State v. Nicholas</u> , 55 Wn. App. 261, 776 P.2d 1385, <u>review denied</u> , 113 Wn.2d 1030, 784 P.2d 530 (1989). .....	33, 35, 42-44
<u>State v. Parker</u> , 102 Wn.2d 161, 683 P.2d 189 (1984).....	31
<u>State v. Parmelee</u> , 108 Wn. App. 702, 32 P.3d 1029 (2001).....	63
<u>State v. Peterson</u> , 168 Wn.2d 763, 230 P.3d 588 (2010).....	60
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	47
<u>State v. Rodriguez</u> , 121 Wn. App. 180, 87 P.3d 1201 (2004).....	40

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>WASHINGTON CASES</u> (Cont'd)	
<u>State v. Sargent</u> , 40 Wn. App. 340, 698 P.2d 598 (1985).....	51
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	58-60
<u>State v. Severns</u> , 13 Wn.2d 542, 125 P.2d 659 (1942).....	35, 42
<u>State v. Shilling</u> , 77 Wn. App. 166, 889 P.2d 948 (1995).....	29
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	32
<u>State v. Sorenson</u> , 6 Wn. App. 269, 492 P.2d 233 (1972).....	29
<u>State v. Tellez</u> , 141 Wn. App. 479, 170 P.3d 75 (2007).....	59
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	37,44, 55
<u>State v. Tvedt</u> , 153 Wn.2d 705, 710, 107 P.3d 728 (2005).....	63
<u>State v. Turner</u> , 169 Wn.2d 448, 238 P.3d 461 (2010) .....	67, 68
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	57
<u>State v. Warden</u> , 133 Wn.2d 559, 947 P.2d 708 (1997).....	25

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>WASHINGTON CASES</u> (Cont'd)	
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	48
<u>State v. Williamson</u> , 84 Wn. App. 37, 924 P.2d 960 (1996).....	35
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007) .....	67
<u>State v. Young</u> , 22 Wn. 273, 60 P. 650 (1900).....	31
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).....	37, 38, 44, 55
 <u>RULES, STATUTES AND OTHER</u>	
Black's Law Dictionary (8th ed. 2004) .....	68
Former RCW 9A.56.200(1)(a).....	35
Former RCW 9A.56.200(1)(b) .....	35
RAP 10.1(g)(2).....	46
RCW 9A.04.110(4)(b) .....	29
RCW 9A.04.110(6).....	28
RCW 9A.36.041 .....	30

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER (Cont'd)</u>	
RCW 9A.46.020 .....	58, 59
RCW 9.61.230(2)(b) .....	59
RCW 9A.56.190 .....	25, 26, 45
RCW 9A.56.200 .....	33
RCW 9A.56.200(1) .....	25
RCW 9A.56.200(1)(a)(i) .....	26, 33, 45
RCW 9A.56.200(1)(a)(ii) .....	26, 33, 45
RCW 9A.56.210 .....	45
RCW 9A.56.210(1) .....	25, 26
RCW 9.94A.533(4) .....	68, 69
RCW 10.61.003 .....	24
RCW 10.61.006 .....	24
RCW 10.61.010 .....	24
U.S. Const. amend. V .....	47, 63
U.S. Const. amend. VI .....	34, 37, 44, 47, 55, 57
U.S. Const. amend. XIV .....	47
Wash. Const. art. I, § 3 .....	47
Wash. Const. art. I, § 9 .....	63

**TABLE OF AUTHORITIES** (CONT'D)

Page

RULES, STATUTES AND OTHER (Cont'd)

Wash. Const. art. I, § 22 ..... 34, 37, 44, 47, 55, 57

A. ASSIGNMENTS OF ERROR

1. The court erred in failing to give instruction on attempted second degree robbery as a lesser offense of attempted first degree robbery.

2. The court erred in failing to give instruction on fourth degree assault as a lesser offense to second degree assault.

3. Appellant received ineffective assistance of counsel when his attorney joined with the State in proposing a defective jury instruction on an uncharged alternative means of committing the crimes of first degree robbery and attempted first degree robbery.

4. The court erred in admitting an unredacted copy of the immunity agreements between the prosecutor's office and witness Martin Monetti. Ex. 32.

5. Prosecutorial misconduct, in the form of improper vouching for witness Monetti in the immunity agreements, violated appellant's constitutional due process right to a fair trial.

6. Defense counsel provided ineffective assistance in failing to object and request redaction of the immunity agreement to remove the improper vouching language.

7. The information charging felony harassment is defective because it omits an element of the offense. CP 150.

8. The court violated the prohibition against double jeopardy in failing to vacate the count III assault conviction and its accompanying deadly weapon enhancement.

Issues Pertaining to Assignments of Error

1. Where a rational trier of fact could infer appellant only committed the lesser crimes, did the court err in refusing to give requested instructions on attempted second degree robbery as a lesser offense of attempted first degree robbery and fourth degree assault as a lesser offense of second degree assault?

2. The definition instruction for robbery contained an uncharged alternative means of committing first degree robbery under count I and attempted first degree robbery under count II. Where evidence supported commission of the crimes based on the uncharged alternative, was defense counsel ineffective in joining in the State's proposed instruction on this point?

3. The defense theory of the case was that Martin Monetti, not appellant, was the perpetrator of the charged crimes. Monetti entered into two immunity agreements with the prosecutor in exchange for his trial testimony. Those immunity agreements, admitted into evidence in unredacted form as Exhibit 32, contained the trial prosecutor's explicit statement "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." Did the admission of the immunity agreements, which expressed an improper opinion, violate appellant's constitutional right to a jury trial?

4. Did prosecutorial misconduct, in the form of improper vouching for witness Monetti by means of the immunity agreement language cited above, violate appellant's constitutional due process right to a fair trial?

5. Was defense counsel ineffective in failing to request object and request redaction of the improper vouching language in the immunity agreement?

6. Is reversal required where the State failed to allege the "true threat" element of the crime of felony harassment in the information?

7. Where the trial court determined the second degree assault conviction merged with the first degree robbery conviction, does the protection against double jeopardy require vacature of the second degree assault conviction and its accompanying deadly weapon enhancement?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Hector Veteta-Contreras with (1) first degree robbery against Walter Flores-Cruz (count I); (2) first degree attempted

robbery against Eliezer Duran (count II); (3) second degree assault against Duran (count III); and (4) felony harassment against Juan Lopez-Pando (count IV). CP 148-150. Co-defendant Pedro Martinez was charged with counts I, II and IV. CP 148-150. The State sought deadly weapon enhancements for each count, in addition to firearm enhancements for counts II and IV. CP 148-50.

A jury returned guilty verdicts on all counts and special verdicts in support of the enhancements. CP 67-76. The court imposed a total of 154 months confinement. CP 95. The court did not impose a term of confinement for the conviction under count III (the assault), concluding it "is same criminal conduct and merges with count II." CP 95. It did, however, impose a 12 month deadly weapon enhancement for count III. CP 95. Veteta-Contreras timely appeals. CP 100-08.

## 2. Trial

### a. The Flores-Cruz Incident

On April 17, 2010 at around 1 o'clock in the morning, Walter Flores-Cruz and his girlfriend Teresa Sierra-Hernandez were at the China Harbor nightclub in Seattle. 2RP<sup>1</sup> 525-27, 532-33, 785. According to

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 10/22/10; 2RP - three consecutively paginated volumes consisting of 12/6/10, 12/7/10, 12/8/10, 12/9/10, 12/13/10, 12/14/10, 12/28/10; 3RP - 1/3/11, 1/4/11 (new pagination contained within volume starting with

Flores-Cruz, four men approached them in the parking lot. 2RP 534, 569. Sierra-Hernandez, on the other hand, was sure there were only two people, a short man and a taller man. 2RP 786, 804. Sierra-Hernandez said the taller man wore a white shirt and identified Pedro Martinez in court as this man. 2RP 790-91.

The other man, with what Flores-Cruz described as a Salvadoran accent, told them to give him \$20. 2RP 534, 543. Flores-Cruz looked at the man's face wondering if he knew him. 2RP 601. When Flores-Cruz asked why, the man again demanded money from about three feet away. 2RP 535-36. Flores-Cruz saw his face. 2RP 537-38, 553. The man wore a black hat, a black jacket or sweater, and black pants. 2RP 538, 578-81. Flores-Cruz, who is 5'7" tall, believed the man in black was "not shorter than me," and described him as being 5'5" or 6". 2RP 553. He later told the 911 operator "I was certain that was the size." 2RP 578. He identified Veteta-Contreras in court as the man in black. 2RP 537, 563. Veteta-Contreras was later measured by police to be 5'3" tall. 2RP 1217.

Sierra-Hernandez said the short man walked up to Flores-Cruz and spoke with him. 2RP 786-87. According to Sierra-Hernandez, the short

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12/27/10); 4RP - 2/4/11 (new pagination contained within volume starting with 12/27/10); 5RP - 12/30/10 (new pagination contained within own volume).

man was right next Flores-Cruz's face and she was right next to them. 2RP 787.

Flores-Cruz did not get a good look at everyone's face in the group of four. 2RP 567-68. It was "really dark" and the lighting "wasn't very good." 2RP 568. The man in the white shirt walked on the other side of Sierra-Hernandez's car. 2RP 537-38. Flores-Cruz identified Pedro Martinez in court as the man wearing the white shirt. 2RP 537-38. Flores-Cruz did not see the faces of the other two men in the group. 2RP 537.

The man in black pushed Flores-Cruz, insisted on begin given \$20, and pulled his shirt up, revealing a machete. 2RP 539. In contrast with Flores-Cruz's description, Sierra-Hernandez maintained the short man who showed the machete wore a gray hoodie with the hood up. 2RP 788. She described the hoodie as very big and baggy, which allowed the man to hide the machete inside. 2RP 793. She described this man as dark skinned with curly hair. 2RP 788-89. Sierra-Hernandez identified Veteta-Contreras as this man in court. 2RP 790. She never made a pre-trial identification, but said she was able to identify Veteta-Contreras because she was traumatized by the event and she remembered faces, but not facial features, well. 2RP 796, 798-99.

Flores-Cruz testified that when he refused to hand over the money, the man in the black shirt pulled the machete out and held it in his hand. 2RP 539-40, 549. Flores-Cruz threw \$20 at him. 2RP 540. The man in black said, "We are from la mara, the beast is on the loose" and gave a gang sign associated with MS-13. 2RP 541-42. MS-13 (Mara Salvatrucha) is a gang in Central America and El Salvador. 2RP 522.

The man in the white shirt, identified in court by Flores-Cruz as Martinez, told the man in the black shirt to ask for another \$20. 2RP 540, 563. The man in the black shirt asked for another \$20 and Flores-Cruz gave it to him. 2RP 541, 544. As Sierra-Hernandez drove off in her car, the man in the black shirt directed derogatory comments toward her. 2RP 550-52. As Flores-Cruz was preparing to leave in his car, the man in black hugged him and said "thanks." 2RP 544.

Flores-Cruz drove away and called the police. 2RP 545. In his 911 call, Flores-Cruz described a man wearing a black jacket and black pants. 2RP 1227. Flores-Cruz thought the man in black might have been drunk. 2RP 583-84. Sierra-Hernandez thought the man with the machete had been drinking or was high on something. 2RP 808. Sierra-Hernandez estimated the entire encounter lasted five minutes: "Not very long. It went by pretty fast." 2RP 794. Flores-Cruz agreed it happened "relatively quickly," anywhere from two to seven minutes. 2RP 568-69, 587.

b. The Duran/Lopez-Pando Incident

Eliezer Duran left the China Harbor nightclub sometime around 1 o'clock in the morning of April 17, 2010 with his girlfriend, his friend Juan Lopez-Pando, and another person. 2RP 608, 611 690, 734, 741. Duran drank alcohol that night. 2RP 688-89, 708.

He heard a group of men screaming and cussing at somebody in a car. 2RP 691. One of the men looked at Duran and approached, followed by three others. 2RP 691, 693. Duran described the man leading the way as 5'3" to 5", with long curly hair, brown skin, wearing a black baseball cap, black T-shirt, blue jeans and black shoes. 2RP 693, 730. Duran thought the man in black could have been drunk because he acted weird. 2RP 732. He acted hyper. 2RP 732-33. Duran identified Veteta-Contreras as this man in court. 2RP 693.

Of the other three men, one was taller and wore a white T-shirt. 2RP 694-95. Duran identified this man in court as Martinez. 2RP 694-95. Duran acknowledged it was dark, but they were under a lamppost. 2RP 735. He maintained his ability to see was "really good." 2RP 735.

The man in black asked for \$5. 2RP 694. According to Lopez-Pando, the man demanded \$5 or "they were going to kill us." 2RP 613. Lopez-Pando identified this man as Veteta-Contreras in court. 2RP 613,

656. According to Lopez-Pando, this man wore dark clothing and some sort of hat. 2RP 634-35, 646.

Duran said he did not have \$5. 2RP 694. The man in black became more aggressive, saying, "give me what you got" and touching Duran's pockets. 2RP 694. The man in the white T-shirt said, "just give him what you got." 2RP 695.

Another man, who was behind the man Duran identified as Veteta-Contreras, wore a black/dark blue shirt with "Abercrombie" written on the front and blue jeans. 2RP 697. That man likewise said, "just give him what you got." 2RP 697. When Duran gave a description of this man to police, he described the man as wearing a black shirt, but did not mention any writing on it. 2RP 751-52. Duran identified this man as Martin Monetti at a later photomontage viewing. 2RP 1215-16. Duran testified Monetti did not hold the man in black back when Duran told him to, but did not touch the machete or hit Duran. 2RP 722.

Duran pushed the man in black away and said he would not give him anything. 2RP 694. The man in black's face was an inch away. 2RP 694. The man in black made a derogatory comment about Puerto Ricans and said, "I'm crazy. I'm Mara Salvatrucha." 2RP 696. Duran responded he did not care what he was. 2RP 697.

When Duran pushed him away, the man in black pulled out what he thought at the time was a cable, but later concluded was a machete. 2RP 698, 763. Duran turned around and was struck once in the back with the "black" object while his back was turned or while he was on his back. 2RP 699, 735-37, 766. It was hard to see when he was hit. 2RP 736-37. He did not get cut and did not feel pain but later that day noticed bruising near his shoulder. 2RP 699, 701-02, 760. He also noticed his shirt was ripped. 2RP 699. At that point Duran came to the conclusion he was struck with a machete because he thought a cable could not have ripped his shirt. 2RP 736, 763.

After he was hit on the shoulder with what he later described as the machete, Duran turned around and saw the man in the white shirt flash a gun tucked in his pants. 2RP 702-04. Duran stood in front of his girlfriend, and the man in black punched Duran twice in the face. 2RP 705. Duran said he was never hit in the face with a machete. 2RP 756.

Lopez-Pando gave a different version of events. According to Lopez-Pando, the man hit Duran on the front of his head with the flat side of the machete three times. 2RP 615, 625-26. Lopez-Pando was about a foot away. 2RP 616. A man in a white shirt then lifted his shirt and showed the handle of a gun. 2RP 615. Lopez-Pando identified this man in court as Martinez. 2RP 616.

Duran testified the men did not threaten to kill Duran or Lopez-Pando. 2RP 740-41. Lopez-Pando remembered things differently, maintaining the man in the white shirt said "don't get involved because he could kill me." 2RP 617, 626. Lopez-Pando also maintained the man he identified as Veteta-Contreras said if they did not give him \$5 "he was going to kill us." 2RP 620. Both men repeatedly said they were members of the Mara Salvatrucha gang and had Salvadoran accents. 2RP 617-18, 620, 624.

A security guard from the club came out and told them to get out. 2RP 621-22. The man in the white shirt showed the handle of the gun to the security guard. 2RP 623. The guard again told them to leave. 2RP 623. They did. 2RP 623, 707-08. Duran estimated the encounter lasted 10-15 minutes. 2RP 708. Lopez-Pando said it all happened pretty quickly. 2RP 642.

c. Martin Monetti And Other Men At the Scene

Martin Monetti, his good friend Denis Garcia, and his acquaintance Robin Barrera were at the China Harbor nightclub that night. 2RP 811-12, 817, 1009, 1124. Monetti testified in exchange for an immunity agreement with the prosecutor, which was admitted into evidence as exhibit 32. 2RP 813-816, 973-79, 984-86, 990, 998-1002.

Monetti drank five or six Corona beers within an hour before going to the club. 2RP 818, 865, 871. He also brought three "Four Loko" drinks with him. 2RP 820. Four Loko is a beverage combining high alcohol content and a high level of caffeine. 2RP 820, 865, 873. Drinking one Four Loko is like drinking six beers. 2RP 865. Monetti and Barrera drank a Four Loko in the club parking lot. 2RP 821-23, 872, 958. To be precise, Monetti chugged it. 2RP 873. He was drunk by that point. 2RP 873. He then drank more Four Loko. 2RP 873-74. Monetti also drank tequila. 2RP 942. He was as drunk as he had ever been in his life. 2RP 998. Monetti acknowledged alcohol lowers inhibitions, affects judgment and made him do things that he might not otherwise do. 2RP 876.

Monetti conceded there was a lot from that night he did not remember because of the drinking. 2RP 869-70. On a memory scale of 0-100 percent with 0 being a complete blackout and 100 being complete memory, Monetti gave himself a 25. 2RP 981-82. He could not even be sure about the 25 percent he did remember. 2RP 998.

According to Monetti, a man came up and started talking with them. 2RP 823-24. Monetti, who is 5'5", said the man was "around my height, a little shorter." 2RP 824. Monetti, Barrera and Garcia each testified the short man did not wear a hat. 2RP 879-81, 948, 1082. Barrera described the short man as dark skinned. 2RP 909-10. Garcia

described the short man as being of "average height," wearing a black shirt and blue pants. 2RP 1020.

A taller man wearing a white T-shirt was with him. 2RP 825, 831, 919, 1019. In court, Monetti and Barrera identified Veteta-Contreras as the short man and Martinez as the tall man. 2RP 832-34, 921-22.

Monetti wore a dark blue shirt with "Abercrombie" written on it and shiny black jeans. 2RP 856-57. Monetti also testified he wore a dark black and blue sweater. 2RP 857, 881. Garcia said Monetti did not wear a sweater. 2RP 1053.

Garcia wore a dark blue hat. 2RP 965. Barrera did not remember if Monetti wore a hat. 2RP 943. Garcia said Monetti did not wear a hat that night and did not borrow Garcia's hat, but acknowledged Monetti had borrowed a hat from Garcia on other occasions. 2RP 1081.

Monetti's group was "hanging out" with the other two men. 2RP 838. According to Barrera, the two men may have been drunk or on drugs, because they were moving around a lot. 2RP 951-53. Monetti was acting hyper. 2RP 919. He was also acting affectionate, like he might hug somebody. 2RP 942.

The two men who engaged Monetti's group said they were from El Salvador and the MS/Salvatrucha gang. 2RP 824-25, 911-13. The men were friendly and acted in a non-threatening manner. 2RP 825, 878-79,

946, 1021-24. The short man showed what Monetti described as "probably a kind of machete, a long stick with pointy things," with teeth or serrated edges. 2RP 826-27, 840-41. He also described it as a "long knife." 2RP 827-28. He was not sure how to characterize the object. 2RP 841. Barrera and Garcia described the object as a machete or knife. 2RP 914-15, 1023-24. The man scraped the machete on the street, making sparks. 2RP 1024. According to Garcia, the man said something like "the devil is out" and was acting hyper. 2RP 1025-26, 1049.

The tall man, meanwhile, showed a revolver tucked in his pants. 2RP 829, 832, 918-19, 936, 1027-29. The tall man told Garcia it was one of the strongest guns and "one shot you pop somebody's head. You know, one shot, and it's done." 2RP 1030. In court, Garcia identified Veteta-Contreras as the man with the machete and Martinez as the man with the gun. 2RP 1033-34, 1062-63. According to Barrera, "it was dark. You couldn't see well." 2RP 922.

Barrera and Garcia saw the short man run after someone in the parking lot with the machete in his hand. 2RP 922-23, 949, 1114. He came back and said the man he chased was a rival gang member. 2RP 1114-15. Barrera did not see the short man hit anyone with a machete or punch anyone. 2RP 949. Garcia did not see any robbery. 2RP 1061, 1064. Barrera left the area and walked towards the club entrance. 2RP

923-24. Garcia drove off in his car to get something to eat. 2RP 1031-32, 1035.

For his part, Monetti maintained the short man asked another person for money, showing the machete. 2RP 834-36, 884. Monetti did not see the short man pull the machete out or punch anyone. 2RP 884. Monetti denied being with the short man as he asked for money. 2RP 882-83. He claimed not to remember if he had his black and blue sweater on when the short man was asking for money. 2RP 857-58. Monetti denied robbing anyone or touching any of the weapons. 2RP 860.

Monetti maintained he and Garcia decided to leave when the two men returned with money "because it was getting kind of dangerous." 2RP 836-37. Monetti also acknowledged he wanted to leave because the police were probably going to be coming. 2RP 885-87.

Garcia said he returned some time later and found Monetti near the front of the club. 2RP 1043. According to Garcia during cross examination, Monetti said someone had given him \$40. 2RP 1065-67, 1077. On redirect, Garcia said he meant Monetti had told Garcia that he saw someone give \$40 to the man with the machete. 2RP 1111-12.

Garcia and Monetti walked toward Garcia's car, which was parked at a different club nearby. 2RP 1037-40, 1043. According to Garcia, the man with the machete approached and asked for a ride. 2RP 1045-46.

Garcia declined. 2RP 1046. The man said his friend got caught up with the police. 2RP 1046. The three continued walking together. 2RP 1047.

Monetti said the "shorter guy", who Monetti this time identified as the defendant "Pedro," started walking with them. 2RP 839-40. The man said the police were coming, pulled out the machete/stick with pointy things, and put it on the bumper of a truck. 2RP 840-41, 843, 967-68.

The group, consisting of Monetti, Garcia, Barrera and "Pedro," kept walking. 2RP 843. At another point in his testimony, Monetti indicated the short man who had the machete and wore the black shirt was with them. 2RP 847.

Monetti said, "let's go" when he saw police arriving. 2RP 1070-71. Monetti denied running. 2RP 966, 1005. Barrera, who by this time was near the club entrance, turned around and saw his friends running. 2RP 926-27. Barrera testified Monetti could have robbed someone with the machete after Barrera left to go back into the club. 2RP 956-57. Barrera also testified Monetti and Garcia ran when they saw the police. 2RP 939-40, 949. Monetti, Garcia and the other man went toward the Marina Mart where police stopped them. 2RP 990.

d. Police Intervention and Aftermath

Police arrived to a chaotic scene at China Harbor. 2RP 332-33, 352. The nightclub caters to a Hispanic clientele certain evenings, and

most of the people milling around were of Hispanic. 2RP 353, 447. There were dozens of people in the parking lot. 2RP 447.

Flores-Cruz told Officer Terry that a person came at him with a "big ass knife" and wanted money. 2RP 370-71, 386. That person told him he was a gangster and "they were going to kill him." 2RP 371. Flores-Cruz identified the person with the machete as wearing a black coat, black pants and black hat with a height of 5'2" to 5". 2RP 397, 402, 409-10. He identified Martinez as the man in the white shirt who said "We're gangster, we can kill you." 2RP 372-74, 385. No weapons were found on Martinez. 2RP 342-43.

Officer Schweiger made contact with Duran and Lopez-Pando at the scene. 2RP 418. Duran told Schweiger that a group of Mexicans came up to him and demanded money. 2RP 419. Duran also said the man "that stood in front of him" had what he described as "a piece of cable or a club." 2RP 419. After the other man in the white shirt showed a handgun, "he got hit several times by the individual standing with what he called the piece of cable." 2RP 420, 424. "He was just describing the person who had actually spoken with him, wanted the money, swung on him and hit him, and had what he described as a cable." 2RP 425. That person was short and wore a black T-shirt and blue jeans. 2RP 426, 467. Duran identified Martinez, who was already detained by this point, with some

hesitation as the person wearing the white shirt and who had a gun in his waistband. 2RP 433-35. No officer found a machete or gun. 2RP 399-400, 1223.

In the midst of an area check, Officer Hairston saw three men, later identified as Monetti, Garcia and Veteta-Contreras, walking together in front of the Marina Mart, which is about one-third mile away from China Harbor. 2RP 480-81, 1220. When ordered to the ground, Garcia and Veteta-Contreras complied. 2RP 483, 495. Monetti did not. 2RP 495.

Monetti threw an object into the bushes and then stood staring at Hairston. 2RP 483. Monetti claimed on direct examination that he threw his wallet because there was marijuana inside. 2RP 844-45. On cross, he acknowledged throwing the wallet away because he was included in a group of people who were demanding money from others. 2RP 864.

Monetti maintained he followed all police instructions. 2RP 876-77. Officer Hairston told a different story. He twice ordered Monetti to the ground. 2RP 483. Monetti finally got down, but stayed propped up on his elbows. 2RP 483-84. Veteta-Contreras was cooperative. 2RP 492, 500. Monetti was uncooperative and laughing, moving and not following commands. 2RP 487. Monetti was displaying what the officer called suspicious "flight behavior," getting up on his elbows and positioning his legs as if he were about to run. 2RP 487, 497.

Two police officers stomped and kicked Monetti while he was on the ground, with one officer yelling "I'm going to beat the fucking Mexican piss out of you, homie, do you feel me." 2RP 490-91, 850-53. The event was captured on video. Id.

Officer Schweiger transported Duran to a show up that was being held at the Marina Mart. 2RP 426. Schweiger told Duran that they were going down "to see if he could identify another suspect." 2RP 426. Schweiger said police shined a spotlight on the suspects from 50 feet away. 2RP 431, 433. Duran testified police did not shine a spotlight on Monetti at the show up. 2RP 724-25, 745. He said he saw the show up suspects clearly. 2RP 724.

Duran identified Veteta-Contreras as the one who wanted \$5 and "the one who hit him. That's the one who had the cable." 2RP 431-32. Duran testified he recognized Veteta-Contreras "because of that feeling you get, you know, when -- from what happened before, and then that feeling that I still had that I was still filled with anger. I could recognize him by the clothes and everything." 2RP 721.

At the show up, Veteta-Contreras did not have a hat on and his jeans were blue. 2RP 453. Garcia, who was also part of the show up, had on a dark baseball cap. 2RP 453-54. Monetti was wearing a black shirt

with white writing on it. 2RP 454-55. Monetti's pants were darker than Veteta-Contreras's pants. 2RP 455.

According to Schweiger, Duran identified Monetti as being in the group of men in the parking lot. 2RP 450. Duran identified Garcia as not taking an active part in the attempted robbery. 2RP 470-73. Duran was sure he drew the correct distinction between Veteta-Contreras and Monetti because, in his words, he had "a really good memory." 2RP 726-27.

An officer later recovered Monetti's wallet from the bushes. 2RP 485, 493. Officer Hairston did not look to see if there was any money or marijuana inside. 2RP 502. When booked into jail, Veteta-Contreras had \$42.25 and Martinez had \$122.28. 2RP 670-71. The bill denominations were unknown. 2RP 677

Based on police reports and witness descriptions, Detective Clement described Veteta-Contreras as having a medium complexion. 2RP 1259-60, 1262. The description of a man being 5'5", wearing a black hat, black coat and black pants was attributed to Barrera in his summary, but it was possible that description could fit Monetti. 2RP 1260-61, 1266.

Various witnesses viewed a photomontage on June 10, 2010, nearly two months after the night in question. 2RP 559-61, 1075-77, 1337, 1209-16. The procedure was not double blind. 2RP 1235-36.

When Flores-Cruz arrived at the police station for the montage viewing, another victim told Flores-Cruz that he had identified #4. 2RP 573-75. Flores-Cruz picked #4 out of the montage as the man with the machete, testifying, "I remember his face." 2RP 559-61. In the seven weeks between the incident and the montage, Flores-Cruz watched video of the incident involving Monetti on television and read about it, but claimed not to have seen or remember seeing pictures of the men arrested. 2RP 571-72. Flores-Cruz was not shown a montage containing Monetti's photo. 2RP 1229.

Duran picked out Monetti in the montage as the man who was with the man in black and the man in the white shirt. 2RP 727-30.

Lopez-Pando identified Veteta-Contreras in the montage as the man with the machete. 2RP 629-30. He identified Martinez in June 10 lineup as the one who showed the gun and made the threat. 2RP 630-33.

Garcia watched a video of the stomping incident, including the men who were arrested, before looking at the police montage. 2RP 1073-75. A week later, Detective Clark showed Garcia a still frame picture of a man from the video, and Garcia identified that man as having the machete. 2RP 1075-77, 1337.

Barrera picked out #4 as the short man with the machete. 2RP 929

He had previously watched the show up video. 2RP 931. He said, "you don't forget their face." 2RP 932.

Psychologist Dr. Geoffrey Loftus, an expert in human perception and memory, testified a number of factors can lead to mistaken identification and that memory, which changes over time, can be affected by environmental factors and post-event information in an unconscious manner. 5RP 5, 12-14, 17, 38-39, 43. Environmental factors affecting ability to perceive include quality of lighting, distance, length of time, and the degree to which someone is under the influence of alcohol. 5RP 17-24. Post-event information capable of distorting memory includes identification procedures that may falsely reconstruct memories of what the perpetrator looked like as well as media exposure of the crime. 5RP 36-38, 56-57.

A form of procedural bias is lack of a double blind procedure, where the police officer that conducts the viewing knows who the suspect is, in which case the officer may inadvertently provide information to the witness about who to pick. 5RP 49-50, 53-54. Show up identification procedures and in-court identifications are particularly vulnerable to circumstances producing unreliable outcomes. 5RP 60-62, 79-80. People can honestly and confidently make identifications that are objectively false.

5RP 33-35, 81. Confidence is not necessarily a reliable indicator of accuracy. 5RP 72-73.

The defense argued in closing that this was a case of mistaken identity. 3RP 93-126. The eyewitnesses who identified Veteta-Contreras as the man with the machete were honestly mistaken in memory and perception. 3RP 93-114, 125. The defense argued Monetti was the perpetrator, not Veteta-Contreras. 3RP 114-124.

C. ARGUMENT

1. THE ATTEMPTED FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS MUST BE REVERSED BECAUSE THE COURT WRONGLY DECLINED TO INSTRUCT THE JURY ON LESSER OFFENSES.

Defense counsel requested inferior degree offense instruction on attempted second degree robbery as a lesser offense of attempted first degree robbery. CP 60-61; 2RP 1276-77. Counsel also requested instruction on fourth degree assault as a lesser to second degree assault. CP 64-66; 2RP 1276-77. The courts denied those requests, claiming no affirmative evidence showed only the lesser offenses were committed. 2RP 1277.

The court erred in failing to give the lesser offense instructions because a rational jury could have inferred Veteta-Contreras committed only the lesser offenses. Affirmative evidence in the record, when viewed

in the light most favorable to Veteta-Contreras, compels that conclusion. The convictions for attempted first degree robbery and second degree assault must therefore be reversed.

Defendants are entitled to have juries instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. Where a defendant is charged with an offense that is divided into degrees, the jury may find the defendant not guilty of the charged degree and guilty of any inferior degree of the offense, including an attempt to commit the crime charged. RCW 10.61.003; RCW 10.61.010; see also State v. Mannering, 150 Wn.2d 277, 284, 75 P.3d 961 (2003) (an attempt to commit a crime is included in the crime itself).

A defendant is entitled to an instruction on an inferior degree offense when (1) the statutes for both 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). The first two factors are the legal component of the test, while the third factor is the factual component. Fernandez-Medina, 141 Wn.2d at 455.

The factual prong of the test is satisfied when evidence raises an inference that the lesser included offense was committed to the exclusion of the charged offense. Id. In other words, a requested jury instruction on a lesser offense must be administered "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." Id. at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). "[T]he evidence must affirmatively establish the defendant's theory of the case — it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, 141 Wn.2d at 456.

By statute, attempted second degree robbery is an inferior degree offense of attempted first degree robbery. RCW 9A.56.190 (defining crime of robbery); RCW 9A.56.200(1) (defining first degree robbery); RCW 9A.56.210(1) (defining second degree robbery). Where a crime is an inferior degree offense, the court need only address the factual prong to determine whether a defendant is entitled to a lesser degree instruction. State v. Ieremia, 78 Wn. App. 751, 755 n.3, 899 P.2d 16 (1995), review denied, 128 Wn.2d 1009, 910 P.2d 481 (1996).

The jury was instructed that a person commits first degree robbery when a person is "armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon." CP 125 (Instruction 13). It was also instructed that a person commits first degree attempted robbery when,

with intent to commit first degree robbery, he does any act that is a substantial step toward the commission of first degree robbery. CP 128 (Instruction 16). The "to convict" instruction for attempted first degree robbery is consistent with that definition. CP 130 (Instruction 18).

Being armed with or displaying a firearm or deadly weapon to take property through force or fear is what separates attempted first degree robbery from attempted second degree robbery. RCW 9A.56.190 (defining crime of robbery); RCW 9A.56.200(1)(a) ("A person is guilty of robbery in the first degree if . . . 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"); RCW 9A.56.210(1) ("A person is guilty of robbery in the second degree if he or she commits robbery.").

Veteta-Contreras was therefore entitled to instruction on the inferior degree offense of attempted second degree robbery if affirmative evidence in the record shows he attempted to commit robbery without being armed with a deadly weapon. In determining whether affirmative evidence allows a rational jury to convict solely on the lesser offense, the court must view the supporting evidence in the light most favorable to the party seeking the instruction and must consider all evidence presented at trial, regardless of its source. Fernandez-Medina, 141 Wn.2d at 455-56.

Officer Schweiger testified about statements Duran made to him at the scene. 2RP 418-19. Duran told Schweiger "the one individual that stood in front of him, that he wouldn't give him any money. He said he had what he described as a piece of cable or a club." 2RP 419. Duran further stated he "got hit several times by the individual standing with what he called the piece of cable." 2RP 420. According to Schweiger, "He was just describing the person who had actually spoken with him, wanted the money, swung on him and hit him, and had what he described as a cable." 2RP 425. At the show up, Duran identified Veteta-Contreras as "the one who hit him. That's the one who had the cable." 2RP 431.

Duran testified that the man in black pulled out what he thought at the time was a piece of cable. 2RP 763. He was struck once with that object, which did not hurt at the time but later caused a "red" bruise on his back. 2RP 699, 701-02, 737, 760. There was a "thin line" on his back from where he was hit. 2RP 760. He was not cut. 2RP 699. He later noticed his shirt was ripped. 2RP 699. Duran came to the conclusion that the object that hit him was a machete because, in his opinion, a cable could not have ripped his shirt. 2RP 736, 763. What he saw was "black" and never did get a good look at what he later concluded was a machete. 2RP 735-37.

Affirmative evidence, when looked at in the light most favorable to Veteta-Contreras, allowed for the inference that Veteta-Contreras used a cable to hit Duran in the back one time, which caused a red, thin line bruise on Duran's back and ripped his shirt. The question is whether this affirmative evidence, viewed in the light most favorable to Veteta-Contreras, would allow a rational trier of fact to find that the cable used on Duran was not a deadly weapon. If a rational juror could reach that conclusion, it necessarily follows that it could find Veteta-Contreras committed attempted second degree robbery to the exclusion of attempted first degree robbery.

RCW 9A.04.110(6) defines "deadly weapon" as "any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a 'vehicle' as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm."

RCW 9A.04.110(6) creates two categories of deadly weapons: deadly weapons per se, namely "any explosive or loaded or unloaded firearm" and deadly weapons in fact, namely "any other weapon, device, instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of

causing death or substantial bodily harm." In re Pers. Restraint of Martinez, 171 Wn.2d 354, 365, 256 P.3d 277 (2011). "[U]nless a dangerous weapon falls within the narrow category for deadly weapons per se, its status rests on the manner in which it is used, attempted to be used, or threatened to be used." Martinez, 171 Wn.2d at 366.

At issue here is the manner in which the cable was used. Relevant circumstances include "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted." State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995) (quoting State v. Sorenson, 6 Wn. App. 269, 273, 492 P.2d 233 (1972)). "Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm." Shilling, 77 Wn. App. at 171. "Substantial bodily harm" means "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

A rational trier of fact, looking at affirmative evidence in the light most favorable to Veteta-Contreras, could believe he used a cable and not a machete on Duran. A rational juror could conclude the cable was not a deadly weapon under the circumstances it was used. The cable caused

bruising of indeterminate duration and minimal severity. Duran never testified whether the bruising lasted beyond the day he noticed its presence. The cable tore Duran's shirt, but did not cut Duran's skin in any way. From these facts, a rational juror could infer Veteta-Contreras did not use a deadly weapon in attempting to rob Duran, which reduces the attempted robbery from first to second degree.

Based on the same facts, the affirmative evidence, looked at in the light most favorable to Veteta-Contreras, allowed a rational trier of fact to infer he committed the crime of fourth degree assault to the exclusion of second degree assault. Instruction on second degree assault required the jury to find Veteta-Contreras assaulted Duran with a deadly weapon. CP 134. The assault as described by witnesses involved an actual battery. The second degree assault charge was based on the same conduct forming the basis for the attempted robbery charge: striking Duran with an object that Duran described at one point as a cable. 3RP 25, 37-38. Veteta-Contreras committed fourth degree assault "if, under circumstances not amounting to assault in the . . . second . . . degree . . . he . . . assault[ed] another." RCW 9A.36.041. The jury, had it been given the opportunity, could infer Veteta-Contreras did not use a deadly weapon in assaulting Duran, which means it could infer that he only committed the lesser offense of fourth degree assault.

Those charged with an offense have an unqualified right to have the jury pass on a lesser offense if there is "even the slightest evidence" that he may have only committed that offense. State v. Parker, 102 Wn.2d 161, 163–64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wn. 273, 276–77, 60 P. 650 (1900)). The factual prong of the test is satisfied in this case because the evidence, viewed in the light most favorable to Veteta-Contreras, allowed for the inference that he committed only the lesser crimes.

Reversal is required when a defendant is entitled to instruction on a lesser charge and the trial court fails to give it. Parker, 102 Wn.2d at 163-64 (where defendant has right to lesser included offense instruction, it is not within appellate court's province to hold defendant was not prejudiced by court's failure to submit lesser included offense to jury); Fernandez-Medina, 141 Wn.2d 462 (failing to give appropriate lesser degree instruction is reversible error). Veteta-Contreras's convictions for attempted first degree robbery and second degree assault must therefore be reversed along with their corresponding sentencing enhancements.

2. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE OFFENSE OF ROBBERY AND COUNSEL WAS INEFFECTIVE IN AGREEING TO THE DEFECTIVE INSTRUCTION.

The information charged only one means of committing the crime of first degree robbery, i.e., "the defendants displayed what appeared to be a deadly weapon, to-wit: a machete." CP 148. The jury instruction defining robbery allowed the jury to consider the alternative means, i.e., the defendant was "armed with a deadly weapon." CP 125. Defense counsel provided ineffective assistance of counsel in joining in the State's proposed instruction that included an uncharged alternative means of committing robbery. Reversal is required because there is a reasonable probability the jury convicted Veteta-Contreras based on an uncharged alternative means.

a. It Is Error To Instruct The Jury On Uncharged Alternative Means Of Committing The Offense.

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

RCW 9A.56.200 sets forth the elements of the crime of first degree robbery in relevant part 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[.]

RCW 9A.56.200(1)(a)(i) (armed with a deadly weapon) and (a)(ii) (displays what appears to be a firearm or other deadly weapon) are alternative means of committing the crime of first degree robbery. State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385, review denied, 113 Wn.2d 1030, 784 P.2d 530 (1989).

The State charged Veteta-Contreras with committing first degree robbery by one of those alternative means: "the defendants displayed what appeared to be a deadly weapon, to-wit: a machete[.]" CP 148.

The "to convict" instruction for first degree robbery included this alternative means: "the defendant displayed what appeared to be a firearm or other deadly weapon." CP 127 (Instruction 15).

Instruction 13, which defined the crime of first degree robbery, included both alternative means: "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 125.

"One cannot be tried for an uncharged offense." State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). The federal and state constitutions demand that a defendant only be tried and convicted on the charge found in the charging document. State v. Frazier, 76 Wn.2d 373, 376, 456 P.2d 352 (1969); U.S. Const. amend. VI; Const. art. 1, § 22.

The trial court erred in instructing the jury on an uncharged alternative means of committing the crime of robbery while "armed with a deadly weapon." CP 125. Veteta-Contreras had the constitutional right to be informed of the nature of the charge against him. U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007); State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003) (uncharged alternative means instruction is error of constitutional magnitude).

"When a statute provides that a crime may be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives, provided the alternatives are not repugnant to one another." Bray, 52 Wn. App. at 34. When an information charges one of several alternative means, it is error to instruct the jury on the uncharged alternatives, regardless of the strength of the evidence presented at trial.

Id. (citing State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (reversible error to instruct the jury on alternative means of committing rape when only one alternative charged)); accord State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996).

In Nicholas, for example, the trial court erred in giving an instruction that included the alternatives of being armed with a deadly weapon or displaying what appeared to be a firearm or deadly weapon. Nicholas, 55 Wn. App. at 272-73. The information alleged the defendant was armed with a deadly weapon under former RCW 9A.56.200(1)(a) but did not allege that the defendant displayed what appeared to be a firearm or other deadly weapon under former RCW 9A.56.200(1)(b). Id.

In Veteta-Contreras's case, the "to convict" instruction did not contain the uncharged alternative means of being "armed with a deadly weapon," but the error still remains because the definition instruction contains the uncharged alternative means. CP 125. In Bray, the "to convict" instruction did not contain the uncharged alternative means but the instruction defining the crime did. Bray, 52 Wn. App. at 33-34. The presence of the uncharged alternative means in the definition instruction still violated the law because "it is error to instruct the jury that they may consider other ways or means by which the crime could have been committed." Id. at 34.

The Supreme Court reached the same conclusion in State v. Lane, 36 Wn.2d 227, 217 P.2d 322, modified on other grounds, 37 Wn.2d 145, 222 P.2d 394 (1950). In Lane, the "to convict" instruction for rape contained only the charged alternative means (resistance is forcibly overcome) whereas the definition instruction contained an additional uncharged alternative means (resistance is prevented by fear of immediate and great bodily harm). Lane, 36 Wn.2d at 230-32. The Court held this was error because the jury must have understood they should find the defendant guilty if they believed he committed the crime based on the uncharged alternative means set forth in the definition instruction. Id. at 234.

As in Lane and Bray, the definition instruction in Veteta-Contreras's case allowed the jury to consider the uncharged alternative means of being "armed with a deadly weapon," despite the absence of the uncharged alternative in the "to convict" instruction. The definition instruction should have omitted the statutory alternative that Veteta-Contreras was "armed with a deadly weapon" because this alternative was not set forth in the charging document.

b. Defense Counsel Provided Ineffective Assistance In Contributing To The Uncharged Alternative Means Error.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Defense counsel joined in the State's proposed instructions at the State's insistence. 2RP 1280. The invited error doctrine does not preclude review where defense counsel was ineffective in proposing the defective instruction. State v. Kylo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." Kylo, 166 Wn.2d at 862.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate

trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869.

Under the ineffective assistance standard, a defendant demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. "*A reasonable probability is a probability sufficient to undermine confidence in the outcome.*" Id. (quoting Strickland, 466 U.S. at 694). Veteta-Contreras "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

This Court's decision in Doogan is instructive. Doogan held defense counsel was ineffective on retrial in proposing instruction that included an uncharged alternative means of committing the crime of promoting prostitution. Doogan, 82 Wn. App. at 187. Addressing the deficiency prong, this Court concluded there was "no reason to suppose that defense counsel's proposal of inadequate instructions was anything but inadvertent." Id. at 189. Doogan's trial attorney did not propose the defective instruction in his client's first trial. Id. This Court rejected the State's argument that Doogan's attorney planted the error in the second trial as a strategic ploy to set up the issue for appeal. Id.

This is Veteta-Contreras's first trial. If the proposal of the uncharged alternative means instruction was deemed inadvertent in Doogan, then agreement to the State's proposed uncharged alternative means instruction in Veteta-Contreras's case must be deemed inadvertent as well. Inadvertence is not a legitimate trial tactic.

Addressing the prejudice prong, this Court in Doogan recognized "[t]he error of offering an uncharged means as a basis for conviction is prejudicial if it is possible that the jury might have convicted the defendant under the uncharged alternative." Doogan, 82 Wn. App. at 189. The jury heard evidence of numerous things that Doogan did that would satisfy the uncharged alternative of advancing prostitution even if it did not consider or believe the evidence of the charged alternative of financial participation in the proceeds. Id. at 190. The abundance of evidence to support a conviction based on the uncharged alternative means of advancing prostitution "serves only to increase the likelihood that the error . . . was prejudicial." Id. at 190 (quoting Bray, 52 Wn. App. at 36).

Here, as in Doogan, there is a reasonable probability that the jury convicted Veteta-Contreras under the uncharged alternative. Lane is again instructive. The jury in Lane heard evidence from which it could find the defendant guilty of the uncharged alternative. Lane, 36 Wn.2d at 234-35. The Court held it was prejudicial error to instruct the jury on the

uncharged alternative means contained in the definition instruction and reversed the rape conviction. Id.; see State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004) (prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis).

The jury in Veteta-Contreras's case heard abundant evidence supporting the uncharged alternative means that he was armed with a deadly weapon. 2RP 539-40, 549, 566-67, 788, 792-93, 826-28, 840-41, 914-15, 1023-24. The abundance of evidence to support a conviction based on the uncharged alternative means of being armed with a deadly weapon serves only to increase the likelihood that the error was prejudicial. Doogan, 82 Wn. App. at 190.

According the Bray court, if the jury only considered the definition instruction and the "to convict" instruction, "any instructional error was arguably harmless because of the explicit directions to convict Bray of the charged crime or acquit her." Bray, 52 Wn. App. at 35. The court nonetheless found lack of harmless error due to "the uncertain effect of the accomplice instruction and the prosecutor's reference to the full statutory definition during closing argument[.]" Id. at 36.

The presence of the accomplice instruction rendered the instructional error prejudicial because it referred to an accomplice in the commission "of a crime" and "the crime" and did not restrict its meaning

to the elements set forth in the "to convict" instruction. Id. at 35. The accomplice instruction, coupled with the definition instruction containing the uncharged alternative means and the prosecutor's reference to the uncharged means as part of "the crime" of forgery, permitted the jury to believe it could find Bray guilty as an accomplice to someone who committed forgery pursuant to the uncharged alternative. Id. at 35-36.

As in Bray, the jury in Veteta-Contreras's case received an accomplice liability instruction referring to commission of "a crime" and "the crime" without restricting what that meant to the elements set forth in the "to convict" instruction. CP 123. The prosecutor argued, "It doesn't even matter who's the principal and who's the accomplice, right? They can be interchangeable." 3RP 32-33.

The prosecutor's theory was that Veteta-Contreras was armed with an actual deadly weapon. The prosecutor told the jury that it could convict Veteta-Contreras of first degree robbery based on the charged means of displaying of what appeared to be a deadly weapon. 3RP 26. But the prosecutor also maintained the charge was based on "possession of a deadly weapon" in the course of that crime. 3RP 25.

In referencing the "to convict" instruction and its "appears" language, the prosecutor argued, "a machete really is a deadly weapon." 3RP 32. The prosecutor repeatedly referred to Veteta-Contreras's use of

"a machete" or "the machete" without qualification. 3RP 29-31, 43, 50. Addressing the deadly weapon enhancement, the prosecutor maintained the machete was real as shown by the evidence. 3RP 63. The prosecutor invited the jury to convict Veteta-Contreras of committing the robbery by means of the uncharged alternative of being armed with a deadly weapon.

That being said, the error is prejudicial under Lane regardless of what the prosecutor argued. The Supreme Court in Lane found prejudicial error despite the lack of any prosecution argument on the uncharged alternative means. It addressed its earlier holding Severns as follows: "While it is true that, in [Severns], the error was accentuated by the argument of the prosecuting attorney (Mr. Barber), this court, in no uncertain language, stated its opinion that the giving of the instruction complained of was prejudicial error, and that the argument of the prosecuting attorney was merely an additional error." Lane, 36 Wn.2d at 234. Thus, regardless of whether the prosecutor in Veteta-Contreras's case accentuated the instructional error during closing argument, the instructional error by itself is prejudicial.

Instructing the jury on an uncharged alternative means may be harmless if there is otherwise no possibility that the jury convicted the defendant on the uncharged alternative means. Nicholas, 55 Wn. App. at 273. In Nicholas, the court held error in instructing the jury on an

uncharged alternative means of committing first degree robbery was harmless because there was no possibility that the jury convicted on the uncharged means due to a special verdict form that required a finding of guilt on the charged means. Id. at 272-73.

Unlike Nicholas, no special verdict form in Veteta-Contreras's case ensured the jury reached a verdict based only on the charged alternative means. The possibility that jurors convicted based on the uncharged alternative means therefore remains. In fact, it is virtually certain the jury convicted Veteta-Contreras of first degree robbery based on the uncharged alternative means of being armed with a deadly weapon because it returned a special verdict that he was so armed. CP 68. The abundance of evidence to support a conviction based on an uncharged alternative means serves only to increase the likelihood that the error was prejudicial. Doogan, 82 Wn. App. at 190. Reversal of the first degree robbery conviction is required.

3. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE OFFENSE OF ATTEMPTED FIRST DEGREE ROBBERY AND COUNSEL WAS INEFFECTIVE IN AGREEING TO THE DEFECTIVE INSTRUCTION.

The information charged only one means of committing the crime of attempted first degree robbery but the instruction defining robbery

allowed the jury to consider an uncharged alternative means. CP 125, 149. Defense counsel provided ineffective assistance in joining in the State's proposed instructions that included the uncharged alternative means error. Strickland 466 U.S. at 685-86; Thomas, 109 Wn.2d at 229; U.S. Const. amend. VI, Wash. Const. art. I, § 22. Reversal of the attempted first degree robbery conviction is required.

Again, being armed with a deadly weapon and displaying what appears to be a firearm or other deadly weapon are alternative means of committing the crime of first degree robbery. Nicholas, 55 Wn. App. at 272-73.

The information charged Veteta-Contreras with attempted first degree robbery by one alternative means: "displayed what appeared to be a firearm and a deadly weapon; to-wit: a machete." CP 149.

The "to convict" instruction for attempted first degree robbery provides as elements of the crime that "the defendant did an act that was a substantial step toward the commission of Robbery in the First Degree against Eliezer Duran" and "That the act was done with the intent to commit Robbery in the First Degree." CP 130.

Instruction 13, which defined the crime of first degree robbery, included both alternative means: "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 125.

Attempt crimes, like completed crimes, may be committed by alternative means. See In re Pers. Restraint of Richey, 162 Wn.2d 865, 871-72, 175 P.3d 585 (2008) (charge of attempted first degree murder included two alternative means: attempted intentional murder and attempted felony murder). The jury could not convict Veteta-Contreras of attempted first degree robbery without considering the deadly weapon alternatives because the use of a deadly weapon or what appears to be a deadly weapon is what elevates the crime of attempted robbery from second to first degree. RCW 9A.56.190 (defining robbery); RCW 9A.56.200(1)(a)(i)-(ii) (defining first degree robbery); RCW 9A.56.210 (defining second degree robbery).

It was error to instruct the jury on the uncharged alternative means of "armed with a deadly weapon" via the definition instruction for the same reasons set forth in section C. 2. a. and b., supra. Lane, 36 Wn.2d at 230-35; Bray, 52 Wn. App. at 33-34. Defense counsel was ineffective in joining in the erroneous instruction for the same reasons set forth in section C. 2. a. and b., supra. Prejudice is shown by the presence of evidence supporting the uncharged means, an accomplice instruction that did not limit criminal culpability to the charged alternative means, and the

prosecutor's argument inviting the jury to believe Veteta-Contreras was armed with a deadly weapon. 2RP 615, 625-26, 736-37, 763, 826-28, 840-41, 914-15, 1023-24; 3RP 25, 33-37, 63. The attempted first degree robbery conviction must be reversed.

4. THE PROSECUTOR'S IMPROPER VOUCHING FOR THE STATE'S WITNESS VIOLATED VETETA-CONTRERAS'S RIGHT TO A FAIR TRIAL.

Pursuant to RAP 10.1(g)(2), Veteta-Contreras adopts the argument set forth in co-appellant Pedro Martinez's opening brief at section D. 1. (p. 60-68). Veteta-Contreras offers additional argument on the impropriety of admitting the unredacted immunity agreements into evidence based on prosecutorial misconduct and ineffective assistance of counsel grounds.

a. The Prosecutor Committed Misconduct In Vouching For Witness Monetti.

The defense argued in closing that this was a case of mistaken identity. 3RP 93-126. The defense theory was that Monetti was the perpetrator, not Veteta-Contreras. 3RP 114-124. The immunity agreements between Monetti and the prosecutor contained the prosecutor's express belief that Monetti did not commit the crimes, thereby directly undermining the defense theory of the case.

In the immunity letter dated September 13, 2010, the prosecutor wrote that based on his review, "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." Ex. 32. In the immunity letter dated December 8, 2010, the prosecutor repeated "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." Ex. 32.

These immunity letters were admitted into evidence as Exhibit 32 as part of the State's case in chief during direct examination of Monetti. 2RP 816. This exhibit remained with the jury as it deliberated. CP 112 (Instruction 1: "Any exhibits admitted into evidence will go to the jury room with you during your deliberations."). Defense counsel did not object to the quoted language in the immunity agreements or request that this language be redacted before it was given to the jury. 2RP 816.

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A defendant's due process right to a fair trial and the right to be tried by an impartial jury is denied when the prosecutor makes improper comments and there is a substantial likelihood the comments affected the jury's verdict. Charlton, 90 Wn.2d at

664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, §§ 3, 22.

"It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (quoting State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)). Improper vouching occurs if the prosecutor expresses his or her personal belief as to the veracity of the witness. Ish, 170 Wn.2d at 196.

Ish addressed improper vouching by means of a plea agreement as a form of prosecutorial misconduct. Ish, 170 Wn.2d at 195-96. The misconduct in Veteta-Contreras's case, however, is of a different magnitude. Comparison between the two cases illustrates the difference.

Ish held it was error to permit the prosecutor to introduce evidence during the State's case in chief that a plea agreement required a State's witness to testify truthfully. Id. at 190-91. Ish recognized the State could properly introduce such evidence on direct examination as a matter of anticipatory rehabilitation where it was clear the defense was going to open the door to the otherwise inadmissible evidence on cross-examination. Id. at 199 n.10.

The Court concluded "[e]vidence that a witness has entered into a formal agreement with the State to testify truthfully should be excluded during direct examination. Once the witness's credibility has been

attacked during cross-examination, the prosecutor may reference the witness's promise to testify truthfully on redirect. However, such evidence should be limited, and the prosecutor may not express a personal belief regarding the witness's credibility or imply that evidence outside of the record would ensure that the promise has been kept." Id. at 201.

Unlike Ish, the problem here is not in the prosecutor's use of the immunity agreements as a means to reference Monetti's promise to testify truthfully. That was likely fair game as a matter of anticipatory rehabilitation, given the defense theory of the case and its attack on Monetti's credibility.

Rather, the problem is that language in the immunity agreements clearly expressed the prosecutor's personal opinion that Monetti played no criminal role in the robberies. The jury should not have heard that expression of personal opinion because it is irrelevant and unduly prejudicial under any circumstance. Commenting on the innocence of another person potentially involved in the crime is an improper invasion of the jury's exclusive province as fact-finder. State v. Dolan, 118 Wn. App. 323, 328-29, 73 P.3d 1011 (2003).

Ish recognizes that even where the State is entitled to reference a witness's promise to tell the truth as part of an agreement, direct forms of prosecutorial vouching contained in the agreement should still be

excluded: "Courts should carefully scrutinize such agreements and exclude language that is not relevant to the defendant's impeachment evidence or tends to vouch for the witness's testimony." Ish, 170 Wn.2d at 199. While the State may ask the witness about the terms of the agreement once the defendant has opened the door, "*prosecutors must not be allowed to comment on the evidence*, or reference facts outside of the record, that implies they are able to independently verify that the witness is in fact complying with the agreement." Id. at 199 (emphasis added).

The prosecutor here commented on the evidence and Monetti's credibility through the language in the immunity agreements that clearly expressed a personal opinion that Monetti did not commit the robberies. That personal expression of belief should have been redacted. "Evidence is not admissible merely because it is contained in an agreement, and reference to irrelevant or prejudicial matters should be excluded or redacted." Id. at 198.

b. The Prosecutor's Misconduct Requires Reversal.

In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). At the same time, if prosecutorial "mistakes" deny a defendant fair trial, then the defendant should get a new one. Fisher, 165

Wn.2d at 740 n.1. The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Id. at 747.

The misconduct here was not the type to be remedied by a curative instruction. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Prejudicial error will be found if it is "clear and unmistakable" that counsel is expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

The immunity agreement language that the prosecutor believed Monetti did not play a criminal role in the robbery of Duran and Flores-Cruz is a clear and unmistakable expression of the prosecutor's personal opinion. We must presume the jury read that expression at least twice as part of Exhibit 32 because that prosecutor's opinion was admitted as a piece of evidence in Exhibit 32. See CP 112 (Instruction 1: "It is your duty to determine which facts have been proved in this case from the evidence produced in court"; "In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question"; "In considering the testimony of any witness, you may take into account . . . the reasonableness of the testimony of the witness considered in light of all the evidence").

There is a substantial likelihood that the prosecutor's improper expression of personal belief in Monetti's innocence influenced the outcome. That personal opinion undermined the defense theory of the case. The evidence, meanwhile, provided a basis for reasonable doubt that Veteta-Contreras was not the one who committed the crimes and that he was incorrectly identified as the one who did.

Flores-Cruz testified the robber wore a black hat, a black jacket or sweater, and black pants. 2RP 538, 578-81. Sierra-Hernandez maintained the short man who showed the machete wore a gray hoodie with the hood up and she described that hoodie in detail as very big and baggy, which allowed the man to hide the machete inside. 2RP 788, 793. That inconsistency in itself lends doubt to the identity of the robber on count I. They could not both be right.

Flores-Cruz was certain that the robber was 5'5" or 6" tall. 2RP 553, 578. Veteta-Contreras is 5'3" tall. 2RP 1217. Monetti is 5'5" tall. 2RP 824.

Duran described the man who attempted to rob him as 5'3" to 5", as wearing a black baseball cap, black T-shirt, and blue jeans. 2RP 693, 730. Lopez-Pando described the man as wearing dark clothing and some sort of hat. 2RP 634-35, 646.

At the show up, Veteta-Contreras did not have a hat on. 2RP 453. Monetti, Barrera and Garcia each testified the man they identified as Veteta-Contreras did not wear a hat that night. 2RP 879-81, 948, 1082. Garcia wore a dark blue baseball hat and Monetti had borrowed a hat from Garcia on other occasions. 2RP 453-54, 965, 1081.

Flores-Cruz testified the robber wore black pants. 2RP 538, 578-81. Veteta-Contreras wore blue pants or jeans that night. 2RP 453, 1020. Monetti wore shiny black pants, which were darker than Veteta-Contreras's pants. 2RP 455, 856-57.

Some witnesses identified Veteta-Contreras as wearing a black shirt, whereas Monetti wore a dark blue shirt with "Abercrombie" written on it as well as a dark black and blue sweater. 2RP 693, 730, 857, 881, 1020. At trial, Duran distinguished the robber from another man in the group who wore a black/dark blue shirt with "Abercrombie" written on the front and blue jeans. 2RP 697. When Duran gave a description of this man to police, he described the man as wearing a black shirt, but did not mention any writing on it. 2RP 751-52.

Duran thought the man who tried to rob him could have been drunk and acted hyper. 2RP 732-33. Monetti was acting hyper. 2RP 919. Monetti was also extremely drunk that night after consuming prodigious amounts of alcohol along with Four Loko, a high alcohol/caffeine

beverage. 2RP 818, 821-23, 865, 871-74, 942, 958, 998. Monetti acknowledged alcohol lowers inhibitions, affects judgment and made him do things that he might not otherwise do. 2RP 876. Barrera testified Monetti was acting hyper as well as affectionate, like he might hug somebody. 2RP 919, 942. The man who robbed Flores-Cruz hugged him afterward. 2RP 544.

Monetti showed consciousness of guilt in tossing his wallet and exhibiting flight behavior when confronted by police. 2RP 483-84, 487, 497, 864. Veteta-Contreras was cooperative and compliant. 2RP 483, 495, 492, 500.

A number of eyewitnesses identified Veteta-Contreras as the perpetrator, but the defense expert's testimony provided a basis to question the reliability and accuracy of those identifications. SRP 12-14, 17-24, 33-39, 43, 49-50, 53-54, 56-57, 60-62, 72-73, 79-81. Evidence allowed for the inference that the eyewitnesses may have mixed up Monetti with Veteta-Contreras. Garcia and Barrera, meanwhile, had reason to cover up for Monetti's actions because they were friends. 2RP 811-12, 1009, 1124.

The evidence allowed for differing conclusions to be drawn whether the State had proved beyond a reasonable doubt that Veteta-Contreras was the perpetrator. There was evidence to support the defense theory that Monetti was the actual perpetrator. There is a substantial

likelihood that the prosecutor's impermissible personal opinion that Monetti did not commit the crimes influenced jurors to find in favor of the State.

c. Counsel Was Ineffective In Failing To Request Redaction Of The Immunity Agreements.

Alternatively, defense counsel provided ineffective assistance in failing to request redaction of the offending language from the immunity agreements. Strickland 466 U.S. at 685-86; Thomas, 109 Wn.2d at 229; U.S. Const. amend. VI, Wash. Const. art. I, § 22.

Defense attorneys must vigilantly defend their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995) ("defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line."). The prosecutor here commented on the evidence and Monetti's credibility through the language in the immunity agreements that clearly expressed a personal opinion that Monetti did not commit the robberies. That personal expression of belief should have been redacted. "Evidence is not admissible merely because it is contained in an agreement, and reference to irrelevant or prejudicial matters should be excluded or redacted." Ish, 170 Wn.2d at 198.

A simple request for redaction of the prosecutor's improper personal opinion from the immunity agreements would have prevented the jury from considering that opinion as it deliberated on Veteta-Contreras's fate. Id. at 198-99. No legitimate strategy justified allowing the prosecutor's prejudicial comment to reach jurors as a piece of evidence to be relied on to establish whether the State proved its case beyond a reasonable doubt.

Defense counsel used the immunity agreements to attack Monetti's credibility during cross examination without referencing the offensive language at issue here. 2RP 973-76, 998-1002. This impeachment strategy could have been fully carried out based on immunity agreements that redacted the prosecutor's personal belief about Monetti's innocence.

The immunity agreement evidence did not drop from the sky. Defense counsel knew it was coming and should have dispensed with the issue before trial. See State v. Evans, 96 Wn.2d 119, 123, 634 P.2d 845, 649 P.2d 633 (1981) ("The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation."). Had defense counsel properly objected before trial to the offending language in the immunity agreements and thereby obtain proper redaction, there would be no need to ask for later instruction to cure the prejudice. There would

be no error to cure. Veteta-Contreras was prejudiced by counsel's failure to request redaction or object before trial for the same reasons advanced in section C. 4. b., infra.

5. THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED AN ELEMENT OF THE CRIME OF FELONY HARASSMENT.

Veteta-Contreras's harassment conviction must be reversed because the charging document does not set forth the "true threat" element of the crime. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. Vangerpen, 125 Wn.2d at 787. Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must therefore be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"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." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information accused Veteta-Contreras of committing the crime of felony harassment as follows: "That the defendants Pedro Jose Martinez and Hector Veteta-Contreras, and each of them, in King County, Washington, on or about April 17, 2010, 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; Contrary to RCW 9A.46.020(1), (2), and against the peace and dignity of the State of Washington." CP 150.

The information fails to allege Veteta-Contreras made a "true threat." It is silent as to the required mens rea that Veteta-Contreras be negligent as to the result of the hearer's fear.

This Court has held the "true threat" allegation need not be included in the charging document because it is merely definitional rather than an essential element. State v. Allen, 161 Wn. App. 727, 753-56 255 P.3d 784 (felony harassment under RCW 9A.46.020), review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011)<sup>2</sup>; State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (same); State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230(2)(b)).

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court,

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<sup>2</sup> The Supreme Court has granted review of this issue in Allen.

however, stated, "It suffices to say that, to convict, the State must prove that a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement is in complete accord with Kilburn, where the Court held a harassment conviction must be reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting Fisher, 165 Wn.2d at 754). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an element of felony harassment. The State's information is deficient because it lacks this element.

Courts presume prejudice and reverse conviction where a necessary element is neither found nor fairly implied from the charging document. McCarty, 140 Wn.2d at 425; State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). This Court must therefore presume prejudice and reverse the harassment conviction because the necessary "true threat" element is neither found nor fairly implied in the information.

6. THE CONVICTION FOR SECOND DEGREE ASSAULT MUST BE VACATED ON DOUBLE JEOPARDY GROUNDS AND ITS ACCOMPANYING DEADLY WEAPON ENHANCEMENT MUST BE VACATED AS WELL.

The conviction for the second degree assault under count III violates the constitutional prohibition against double jeopardy. As recognized by the trial court, Count III merged with the attempted first degree robbery. The mandatory remedy for a conviction that violates double jeopardy is vacature. The court erred in failing to vacate the assault conviction.

That failure led to a further sentencing error. The court imposed 12 months confinement for the deadly weapon enhancement attached to count III. This is prohibited because a conviction that offends double

jeopardy must be vacated, thereby avoiding adverse consequences flowing from the conviction such as a deadly weapon enhancement.

- a. The Court And State Agreed Count III "Merged" With Count II But Still Treated Count II As Having Legal Effect.

In its presentence statement, the State conceded the second degree assault under count III fell within the same criminal conduct as the attempted robbery under count II "and so the counts merge." CP 155. The State maintained the deadly weapon enhancement for count III did not "merge" and ran consecutively to all other sentences. Id.

At the sentencing hearing, the prosecutor recited the crimes for which Veteta-Contreras was convicted, including the second degree assault under count III. 4RP 4. It again acknowledged count III was the same criminal conduct as count II, but that the count III enhancement still applied. 4RP 5. The prosecutor described it as an "agreed merger, with the exception on the deadly weapon enhancement on Count Three[.]" 3RP 5. There was no dispute from defense counsel as to the sentencing ranges or enhancements: "it is essentially an agreed recommendation." 4RP 7.

The court announced it was following the State's recommendation. 2RP 15.<sup>3</sup> The judgment and sentence states, "Count 3 is same course of criminal conduct and merges with count II." CP 95. The court did not sentence Veteta-Contreras on count III. CP 95. The judgment and sentence, however, reflects the second degree assault conviction under count III as if it remains valid, assigning it an offender score of two. CP 92-93. The court did not vacate the count III conviction. The court allowed the deadly weapon enhancement for count III to remain and imposed sentence on it. CP 93-94.

b. The Court Erred in Failing To Vacate The Assault Conviction Due To The Double Jeopardy Violation.

Both the Fifth Amendment of the United States Constitution and Article 1, section 9 of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). One of the purposes of the double jeopardy clause is to prevent multiple punishments for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Merger is based on the protection against double jeopardy. State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). The merger doctrine avoids double punishment by merging a lesser offense "into the

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<sup>3</sup> The court said it concurred with the State that "Count Four is the same course of conduct." 4RP 15. Given the context, it apparently meant count III.

greater offense when one offense raises the degree of another offense." State v. Collicott, 118 Wn.2d 649, 668, 827 P.2d 263 (1992).

Veteta-Contreras may raise this double jeopardy challenge for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). Defense counsel's agreement to the State's recommended sentence does not waive the double jeopardy challenge. See In re Pers. Restraint of Francis, 170 Wn.2d 517, 522, 242 P.3d 866 (2010) (guilty plea did not waive double jeopardy challenge to court's ability to enter convictions and impose sentence for duplicative charges).

The trial court, in accordance with State's recommendation, did not sentence Veteta-Contreras for second degree assault because it determined that offense was the "same criminal conduct" and "merged" with the attempted first degree robbery. CP 95. The court was correct that the second degree assault merged with the attempted first degree robbery. The fact that the court did not sentence Veteta-Contreras for the assault indicates some understanding that double jeopardy was implicated here.

Where the State uses second degree assault conduct to elevate the robbery charge to the first degree, the offenses generally merge and are the same for double jeopardy purposes unless they have an independent purpose or effect. Francis, 170 Wn.2d at 525, 532; Freeman, 153 Wn.2d at 780. Veteta-Contreras's case is a textbook example.

In making the merger determination, courts view the offenses *as charged*, not how they could have been charged. Francis, 170 Wn.2d at 523-24. The first degree attempted robbery was charged here as follows: "did unlawfully and with intent to commit theft attempt to take personal property of another, to-wit: U.S. currency, from the person and in the presence of Eliezer Duran, against his will, by use or threatened use of immediate force, violence, and fear of injury to such person or his property and to the person or property of another, and in the attempted commission of and in immediate flight therefrom, the defendants displayed what appeared to be a firearm and a deadly weapon, to wit: a machete[.]" CP 149.

The second degree assault was charged as "did intentionally assault Eliezer Duran with a deadly weapon, to-wit: a machete[.]" CP 150.

The State in this manner used the second degree assault conduct to elevate the attempted robbery charge to the first degree. See Francis, 170 Wn.2d at 524 (using analogous charging language for intent to cause bodily injury). The 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.

"Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume

the legislature intended to punish both offenses through a greater sentence for the greater crime." Freeman, 153 Wn.2d at 772–73. We must presume the legislature intended to punish Veteta-Contreras's second degree assault through a greater sentence for the attempted first degree robbery.

This conclusion is supported by the fact that these offenses had no independent purpose or effect. Here, as in Frances, "the sole purpose of the second degree assault was to facilitate the attempted robbery. The assault was not 'separate and distinct' from the attempted robbery; it was incidental to it." Francis, 170 Wn.2d at 525. The assault had no purpose and effect other than to force Duran to submit to the robbery.

It is established that the remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense. See, e.g., State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009); State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). In Francis, for example, the Supreme Court did what the trial court should have done here: vacate the second degree assault because it merged with the attempted first degree robbery under double jeopardy. Francis, 170 Wn.2d at 531, 532.

There is a simple reason why vacature is necessary even under circumstances where the conviction is not reduced to judgment and sentence. "The term 'punishment' encompasses more than just a defendant's sentence

for purposes of double jeopardy." State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). "[E]ven a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protections." Turner, 169 Wn.2d at 454-55. The lesser conviction in and of itself violates double jeopardy because it may result in future adverse consequences and, at the very least, carries a societal stigma. Id.; State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007). Double jeopardy is thus violated even where a person is not sentenced for the offending conviction. State v. Gohl, 109 Wn. App. 817, 822, 37 P.3d 293 (2001) (rejecting State's argument that there was no double jeopardy violation because the trial court imposed no sentence for the assaults, finding them to encompass the same conduct), review denied, 146 Wn.2d 1012 (2002).

c. The Court Erred in Failing To Vacate The Accompanying Deadly Weapon Enhancement.

Veteta-Contreras's conviction for second degree assault, however, goes beyond the punishment of stigma. Double jeopardy is violated when the sentencing court gives any indication that the lesser offense is still a viable conviction. Turner, 169 Wn.2d at 464-65. The judgment and sentence lists the assault conviction as if it survives. CP 92-93.

More importantly, the court allowed a conviction that offends double jeopardy to form the basis for imposition of a deadly weapon enhancement.

It wrongly imposed 12 month deadly weapon enhancement for the assault conviction under count III. CP 95.

A conviction that offends double jeopardy retains no validity whatsoever. Turner, 169 Wn.2d at 464. And a conviction subject to vacature has no legal force or effect. To "vacate" means "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary 1584 (8th Ed. 2004). For all legal purposes, the vacated conviction does not exist.

By definition, a vacated conviction cannot provide the basis for imposition of a deadly weapon enhancement. Without an extant conviction, there can be no enhancement. See Gohl, 109 Wn. App. at 822 ("Because the attempted first degree murder and first degree assault convictions are the same in law and in fact, they constitute double jeopardy. For this reason, we vacate the assault convictions and the corresponding deadly weapon sentence enhancements."); State v. Crumble, 142 Wn. App. 798, 801, 177 P.3d 129 (2008) (convictions for first degree assault violated double jeopardy because based on based same criminal acts forming the basis of the attempted murder convictions; "[a]ccordingly, we vacate the assault convictions and sentences, including their firearm enhancements.").

The statutory scheme is in accord with constitutional mandate. RCW 9.94A.533(4) specifies additional time for a deadly weapon

enhancement "*shall be added to the standard sentence range* for felony crimes committed after July 23, 1995, *if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection* as eligible for any deadly weapon enhancements based on the classification of the completed felony crime." RCW 9.94A.533(4) (emphasis added).

Veteta-Contreras was *not sentenced* for the assault conviction under count III due to the double jeopardy problem. The plain language of the enhancement statute allows for imposition of enhancement time only if the offender is *sentenced* for an eligible crime. This case should be remanded for entry of an order vacating the second degree assault conviction and deadly weapon enhancement under count III.

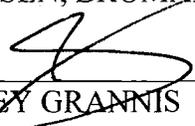
D. CONCLUSION

For the reasons stated, Veteta-Contreras respectfully requests that this Court reverse the convictions and associated sentencing enhancements. In the event this Court declines to reverse all convictions, the conviction and sentencing enhancement under count III case should be vacated and the case remanded for resentencing on remaining counts.

DATED this 13<sup>th</sup> day of January 2012.

Respectfully Submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66658-4-1
	)	
HECTOR VETETA-CONTRERAS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13<sup>TH</sup> DAY OF JANUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF JANUARY 2012.

x *Patrick Mayovsky*

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STATE OF WASHINGTON  
2012 JAN 13 PM 4:12**