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DIVISION II

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STATE OF WASHINGTON
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NO. 39246-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

EUGENIO ANTHONY COLON, III

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF COWLITZ COUNTY

Before
The Honorable James J. Stonier, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived the appellant of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution by entering a conviction of second degree assault (agony or torture) in the absence of the proof beyond a reasonable doubt.

2. There was insufficient evidence to support a separate conviction of unlawful imprisonment.

3. There was insufficient evidence that the appellant committed felony harassment.

4. There was insufficient evidence to establish that the offense of second degree assault (agony or torture) was committed with the aggravating factor of deliberate cruelty.

5. The aggravating factor of “invasion of privacy” did not apply.

6. The trial court erred in failing to instruct the jury as to the definition of “invasion of privacy,” an aggravating factor alleged by the State in Special Verdict Form E. [Clerk’s Paper 110].

7. The trial court erred in sending the special verdict questions to the jury.

8. The appellant’s sentence was clearly excessive.

9. Error is assigned to Finding of Fact Regarding Exceptional

Sentence Number 1(a) which reads:

The offense involved deliberate cruelty or intimidation.

10. Error is assigned to Finding of Fact Regarding Exceptional

Sentence Number 1(b) which reads:

The offense was an invasion of the victim's privacy.

11. The trial court erred in sentencing the appellant where Counts 1, 4, and 5 encompassed the same criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment Due Process Clause requires a criminal conviction be supported by proof beyond a reasonable doubt of each element of the crime. To convict a person as an accomplice to a crime, the State must prove more than a person's mere presence and knowledge that a crime may be committed. Instead the State must prove beyond a reasonable doubt the person acted with knowledge that he was assisting in or facilitating the crime of conviction. Here, the State's theory was that appellant Eugenio Colon III [Colon] was an accomplice to second degree assault (agony or torture) of Rigoberto Zalaya—committed by Joshua Clark—because the evidence showed that Colon, Joshua Clark and Brian Clark pushed Zalaya into the Clarks' apartment, that Brian Clark put a sock in Zalaya's mouth, one of the Clark brothers hit him, and Joshua Clark heated a knife and held it close to Zalaya's ear, and that Colon then

left the apartment, and that Colon told his girlfriend Brenda Brown that “his boys had taken care of” Zalaya because he was disrespectful and owed him money. 4Report of Proceedings [RP] at 21.¹ Did the State prove beyond a reasonable doubt that Colon acted with knowledge that he was assisting in or facilitating the commission of an assault? (Assignment of Error 1)

2. Was there insufficient evidence to support a conviction for unlawful imprisonment, where the restraint involved in the offense was merely incidental to, and not independent of, second degree assault committed by Joshua Clark? (Assignment of Error 2)

3. There was no evidence that Zalaya reasonably feared that the appellant planned to kill him immediately or in the future. As the evidence was insufficient, was it error to enter a conviction for felony harassment? (Assignment of Error 3)

4. Did the State present sufficient evidence to establish the aggravating factor of deliberate cruelty to Zalaya where the facts supporting the aggravating factor of deliberate cruelty were already accounted for by the Legislature in the definition of the elements of the

¹The Verbatim Report of Proceedings consists of six volumes:
1RP April 7, 2009, motion hearing;
2RP April 9, 2009, motion hearing;
3RP April 13, 2009, suppression motion and jury trial;
4RP April 14, 2009, jury trial;
5RP April 15, 2009, jury trial and jury’s verdict; and
6RP April 29, 2009, sentencing.

underlying crime of second degree assault (agony or torture)?

(Assignments of Error 4 and 9)

5. An aggravating factor must distinguish the current case from others of the same type and must not be based on conduct which the Legislature necessarily considered in setting the presumptive range. Did the court err in relying on the aggravating factor of "invasion of privacy" when case law suggests that such a violation inheres in and cannot be an aggravating factor? (Assignments of Error 5 and 10)

6. Did the trial court err in failing to define the phrase "invasion of [Zalaya's] privacy" for the jury when that term constitutes a term of art with a very specific meaning that is not immediately apparent to the average juror? Assignments of Error 3 and 8)

7. Did the trial court err in sending the special verdict questions regarding whether or not the case involved deliberate cruelty and invasion of privacy to the jury where the facts of the case did not support giving the instruction for a special verdict for deliberate cruelty or invasion of privacy and where the court did not give an instruction defining "invasion of privacy"? (Assignment of Error 6)

8. Is the appellant's sentence clearly excessive where the facts introduced at trial do not support the aggravating factors? (Assignments of Error 7 and 8)

9. Do unlawful imprisonment, second degree assault (agony or torture), and harassment (threat to kill) constitute the “same criminal conduct” under the facts and circumstances of the case? (Assignment of Error 11)

C. STATEMENT OF THE CASE

1. Procedural history:

Eugenio Colon III was charged by information filed in Cowlitz County Superior Court with first degree kidnapping (Count 1); first degree robbery (Count 2); second degree assault with a deadly weapon (Count 3); second degree assault—agony or torture (Count 4); and harassment—threat to kill (Count 5). CP 1-3. He was initially charged with two co-defendants, brothers Brian Clark and Joshua Clark. CP 1. Colon’s case was severed from the Clark brothers on January 20, 2009, pursuant to the State’s motion. CP 4.

The State gave notice on April 7, 2009 that it would seek an exceptional sentence and that offenses were, *inter alia*, committed with deliberate cruelty and or intimidation of the victim, as provided by RCW 9.94A.535(3)(a), and the offense involved an invasion of Zalaya’s privacy, as provided by RCW 9.94A.535(3)(p). CP 9-10.

Colon was tried by a jury on April 13, 14, and 15, 2009, the Honorable James J. Stonier presiding. Following a suppression hearing the

morning of trial, Judge Stonier ruled that statements made by Colon to law enforcement on November 28, 2008 were admissible. 3RP at 52-53.

The court gave an instruction for the lesser included offense of unlawful imprisonment in Count 1. 5RP at 52; CP 80, 81; Instructions 15 and 16. The defense did not note exceptions to requested instructions not given or object to instructions given. 5RP at 55.

At the close of testimony the jury was instructed in pertinent part as follows:

Instruction Number 30.

. . .

For the purposes of special verdict form D, “deliberate cruelty” means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime.

Because this is a criminal case, each of you must agree for you to return a verdict or special verdict. When all of you have so agreed, fill in the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP 98.

The court provided Special Verdict Form E to the jury. The form provided:

We the jury, return a special verdict by answering as follows:
Did the crime involve an invasion of Rigoberto Zalaya’s [sic] privacy?

CP 110.

Instruction 30 contains references to special verdict form E but provides no definition of “invasion of privacy.” CP 97, 98.

In closing, the State argued in pertinent part:

Find that he was deliberately cruel. Clearly burning someone with a knife is beyond the pale, it’s almost something that you think of as a medieval torture, the inquisition, something like that. Find that they abused Rigoberto’s privacy, that they invaded and attacked him in a place, meager as it may be, but in a place that Rigoberto was his home. It may not seem like much to you or I, but it was about all he had.

5RP at 88.

On April 15, 2009, the jury returned a verdict of guilty on the lesser included offense of unlawful imprisonment (Count 1), second degree assault—agony or torture (Count 4), and harassment—threat to kill (Count 5). CP 101, 104, 105. He was acquitted of Counts 2 and 3. CP 102, 103. The jury also found that the crimes were committed with both aggravating factors alleged by the State. 5RP at 120; CP 109, 110.

At sentencing on April 29, 2009, defense counsel argued that the convictions for unlawful imprisonment, assault in the second degree, and harassment constituted the same criminal conduct, and that Colon’s criminal intent in the commission of all three offenses was to obtain money from Zalaya. 6RP at 7-8. The State argued that Colon’s objective criminal intent changed, and that his intent in Count 1 was to “restrain and secret the victim; an intent to torture the victim; and, . . . an attempt to

threaten and prevent the victim from reporting [the incident].” 6RP at 5. The State objected to defense counsel’s argument that a different judge found the offenses constituted the same criminal conduct in Joshua Clark’s and Brian Clark’s cases. 6RP at 7, 17.

Judge Stonier found although the motive was to obtain money from Zalaya, the intent of unlawful imprisonment was to “take him to an area and keep him in an area where he couldn’t be found,” and that the intent of the assault was to inflict pain. 6RP at 10. The court found that the act of unlawful imprisonment was complete “at the point that the burns are inflicted,” and that the second degree assault had a different intent. 6RP at 11. The trial court imposed an exceptional sentence of thirty months in Counts 1 and 4, and nine months in Count 5. CP 116.

Timely notice of appeal was filed on April 29, 2009. CP 125. This appeal follows.

2. Trial testimony:

Rigoberto Zalaya met Colon and his girlfriend Brenda Brown in late October, 2008. 3RP at 69. They agreed to rent an apartment together and to split the rent. 3RP at 69. Zalaya, Colon, and Billy Goodwin stayed in a hotel for one night, and then Zalaya, Colon, and Brown obtained an apartment at 1262 12th Avenue in Longview, Washington in November, 2008. 3RP at 69, 70, 89, 91, 4RP at 7. Zalaya gave Colon and Brown

\$200.00. 3RP at 91. Brown stated that all three of them lived in the apartment, and that the agreement was for Zalaya to pay half the rent, and that the rent for the apartment was \$450.00 with a \$400.00 deposit to move in. 4RP at 55. She stated that Zalaya initially gave her \$60.00, and then gave her \$140.00 later. 4RP at 55.

Zalaya testified through an interpreter that three weeks after moving in, Colon asked him for \$400.00, but that he did not have any money and did not give Colon any money. 3RP at 70.

Zalaya stated that on November 26, while in the apartment, he woke up and Colon was holding a knife to his throat. 3RP at 72, 95. He stated that Colon was with two other men he identified as the Clark brothers, who also had an apartment in the building. 3RP at 71, 72. Zalaya stated that they hit him and while doing so, told him that if he called the police they would kill him. 3RP at 73. He said that he believed that they would kill him and that he was afraid. 3RP at 83. Zalaya stated that they put him against a wall that Colon took his wallet from his back pocket, and took \$12.00 from it. 3RP at 73, 74. Zalaya testified that they then pushed him down the hall to the Clarks' apartment. 3RP at 75. He stated that in the Clarks' apartment, one of them put a sock in his mouth. 3RP at 75. He stated one of the Clark brothers began to hit him, and then Colon left the apartment. 3RP at 77. After Colon left one of the Clark

brothers burned Zalaya with a hot knife on his hand, ear, and nose. 3RP at 78.

Later Zalaya went back to the apartment he shared with Colon and Brown, and left the following morning and went to the Salvation Army. 3RP at 84. He called the police at approximately 7:00 p.m. that night. 3RP at 84-85.

Chris Blanchard, a Longview police officer, responded to a call on November 28, 2008 and interviewed Zalaya. 3RP at 121. Officer Blanchard observed burns on Zalaya's arm, left side of the tip of his nose, right ear, and top of his forehead, which he photographed. 3RP at 123, 124, 125, 126, 127. He also saw a faint, u-shaped mark on his abdomen. 3RP at 127, 128. Zalaya went to a doctor about ten days later. 3RP at 114.

Officer Blanchard went to the apartment at 1262 12th Avenue on November 28 and talked with Colon. 4RP at 20. He testified that Colon told him that he had told Brenda Brown "his boys had taken care of Rigoberto" and that Colon had told Brown that "his boys had burned Mr. Zalaya." 4RP at 20. He said that Colon told him that he had come into the apartment and Zalaya was on a mattress in the apartment, but did not acknowledge him and that he was being disrespectful. 4RP at 21. He stated that Colon told him that they walked to Clarks' apartment and then

Brian Clark took a sock off Zalaya's foot and put the sock in Zalaya's mouth, and that Colon made Clark take the sock out of his mouth. 4RP at 21. He stated that Colon told him that Joshua Clark had a butter knife and lighter, and that he heated the tip of the knife and put it next to Zalaya's right ear, but that he did not see the knife actually touch Zalaya. 4RP at 21-22. Officer Blanchard stated that Colon told him several times that he told Zalaya that they were playing and joking. 4RP at 22. After making a second written statement, Officer Blanchard stated that Colon told him that when he first went into his apartment, he was with Brian Clark and they had Zalaya stand against a wall with his hands out and they frisked him. 4RP at 24. Officer Blanchard stated that he left the Clarks' apartment and went to Annette Aughtry's apartment, a friend in the building. 4RP at 26.

Annette Aughtry lived in Apartment No. 2 in the same building as Colon, Brown, and Zalaya. 4RP at 94. She stated that she saw Colon early in the day on November 26, and because it was his birthday, she told him to buy beer and come by later and have a birthday drink. 4RP at 97. She stated that Colon came by her apartment later that night between 11:00 and 12:00 p.m. 4RP at 98. He stayed at her apartment drinking and playing a dice game with others who were there until at least 4:00 a.m., when she went to sleep. 4RP at 99. She stated that he was in the

apartment the entire time until she went to sleep, except for around 3:00 a.m. when he left for approximately five minutes and then came back. 4RP at 99.

Brown testified that on November 26 she left the apartment to go to work at approximately 11:00 p.m., and Colon and Zalaya were at the apartment at the time. 4RP at 58, 71. When she returned at 3:00 a.m., Zalaya was on the floor watching television. 4RP at 59. She stated that she asked him where Colon was, and he said that he did not know. 4RP at 59. She went to another apartment and found him there. 4RP at 60. She said that Zalaya left Thanksgiving morning between 10:30 and 11:00 a.m. 4RP at 61.

Brown stated that Zalaya had not paid his portion of the rent and that there were things he had done that caused them to ask him to leave in the middle of November. 4RP at 70. Brown testified that Colon told her that they would not have to worry about getting Zalaya out of the apartment because he had been told to leave and that Josh and Brian Clark had taken care of the problem. 4RP at 61, 62. She made a written statement that Colon told her that the Clarks had burned Zalaya. 4RP at 63. She stated that her "mental status was not great" at the time she made the written statement. 4RP at 64.

D. ARGUMENT

1. THE TRIAL COURT DEPRIVED COLON OF DUE PROCESS BY ENTERING A CONVICTION FOR SECOND DEGREE ASSAULT

- a. Due process requires proof of each essential element of a crime beyond a reasonable doubt.**

In a criminal prosecution, the Due Process Clause of the Fourteenth Amendment requires the State prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In assessing a claim of insufficiency of the evidence, a reviewing court must determine “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *Green*, 94 Wn.2d at 221.

- b. The State was required to prove beyond a reasonable doubt that Colon had knowledge that his actions would facilitate or aid in the commission of the assault committed by Joshua Clark.**

To establish a person is an accomplice to a crime, RCW 9A.08.020 requires the State prove “that individual . . . acted with

knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged.” *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). “The Legislature . . . intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has ‘knowledge.’” *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000). Thus, while an accomplice need not have actual knowledge of each element of the principal’s substantive offense, the accomplice must have knowledge of the substantive offense generally. *Id.* at 513.

The consolidated cases in *Cronin* make clear what the statute and Court require with respect to knowledge of the general offense. *Cronin* was convicted of first degree premeditated murder. The Court noted that this could only occur if the State proved beyond a reasonable doubt (1) *Cronin* acted with premeditated intent and murdered the victim; or (2) had knowledge that his confederate would murder the victim. *Cronin*, 142 Wn.2d at 581. Thus, *Cronin* did not have to have knowledge of each element of first degree murder to be guilty as an accomplice but was required to have knowledge that a murder would be committed.

In a case consolidated with *Cronin*, *State v. Bui*, the Court similarly held that where *Bui* was found guilty as an accomplice to a second degree assault, he had to be aware that his actions were facilitating an assault, although not the specific degree of assault. *Cronin*, 142 Wn.2d

at 581. *Cronin* and *Roberts* establish that to convict a person as an accomplice he or she must have knowledge of the general crime the principle will commit.

To prove Colon was guilty as an accomplice to second degree assault the State was required to prove he knew he was facilitating, promoting or aiding in the commission of an assault. It is not enough that State's evidence may have established Colon knew he was assisting in the commission of a crime other than assault. *See, Cronin*, 142 Wn.2d at 579.

As set forth below, the State failed to prove beyond a reasonable doubt that Colon knowingly facilitated, promoted, encouraged or aided in an assault in the Clarks' apartment.

c. The State did not prove Colon was an accomplice to the assault committed by Joshua Clark.

In its best light, the State's evidence established Colon and the Clark brothers pushed Zalaya into the Clarks' apartment, that one of them put a sock in Zalaya's mouth, and that one of the Clark brothers hit Zalaya. 3RP at 74-75. The evidence shows that Colon saw Joshua Clark heating a knife with a lighter and holding the knife close to Zalaya's ear, and that Colon left the apartment at that point. 3RP at 76-77, 4RP at 25, 26. The State's evidence shows that Colon told Officer Blanchard that he told Brown that "his boys had taken care of Rigoberto" and that Colon had

told Brown that “his boys had burned” Zalaya. 4RP at 62.

At trial the State argued that Colon encouraged or commanded the Clark brothers to burn Zalaya and that his statement to Brown that “his boys” “took care of” Zalaya was evidence that he had commanded or encouraged them to assault him. 5RP at 81. The record, however, shows no control or command over the Clark brothers by Colon, and contains no evidence that he instigated or facilitated the assault in their apartment. Accomplice liability requires more than an alleged accomplice’s proximity to a crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d (1981). Even proximity coupled with knowledge that his presence will aid in the commission of the crime is insufficient. *Id.* Instead, the State must establish the person was present and ready to assist in the commission of the crime. *Id.* The State’s theory that he told Brown after the fact that “his boys”—the Clark brothers—“took care of” Zalaya falls far short of the actual requirements of accomplice liability. That Joshua Clark may have elected to burn Zalaya with the knife after Colon left the room does not establish Colon’s knowledge that Joshua Clark would do so. The State’s actual evidence establishes only that Colon and the Clarks pushed Zalaya into the apartment, that he saw Joshua Clark heat the knife and hold it close to his ear. The State’s effort to fill the remaining gap with the speculation and conjecture of its novel ‘Colon commanded the Clark

brothers' theory is not proof beyond a reasonable doubt as a matter of law. In the absence of sufficient evidence to establish Colon acted with knowledge that Zayala would be assaulted when he was taken to the Clark's apartment, he could not be convicted of second degree assault.

d. The State's failure to prove each element of second degree assault requires this Court to dismiss that charge.

Where a conviction is based on insufficient evidence, the double jeopardy clause requires reversal of the conviction and dismissal of the charges. *Burks v. United States*, 437 U.S. 1, 18, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978). Because the State did not prove Colon was an accomplice to second degree assault his conviction must be reversed and double jeopardy prohibitions will not permit the State to file the charges anew.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A SEPARATE CONVICTION FOR UNLAWFUL IMPRISONMENT BECAUSE THE FORCE AND RESTRAINT USED WAS MERELY INCIDENTAL TO ASSAULT.

To convict Colon of unlawful imprisonment, the State had to prove that he "knowingly restrained" Zayala. See RCW 9A.40.040(1).

"Restrain" means to "restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty." RCW 9A.40.010(1).

Restraint is "without consent" if it is accomplished by "physical force, intimidation, or deception[.]" RCW 9A.40.010(1)(a).

A review of Colon's testimony shows that the unlawful imprisonment continued during the assault—he was held by the Clarks, and he was held in the Clarks' apartment at the time Joshua Clark burned him with the hot knife. 3RP at 75, 76.

It is well settled under Washington law that restraint and movement of a victim that are merely incidental and integral to commission of another crime, such as rape or murder, do not constitute the separate crime of kidnapping. *State v. Green*, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980)); *see also, State v. Vladovic*, 99 Wn.2d 413, 430, 662 P.2d 853 (1983). The same doctrine should apply to the crime of unlawful imprisonment; if the restraint is incidental and integral to the commission of another crime, like assault, then the restraint does not constitute a separate crime of unlawful imprisonment.

Green is dispositive in this case. In *Green, supra*, the defendant had carried the victim 50 to 60 feet and placed her behind a building. *Green*, 94 Wn.2d at 222-24 n.4. The Supreme Court concluded that this movement was merely incidental to the subsequent homicide and could

not support a separate conviction for kidnapping. *Green*, 94 Wn.2d at 226-27. The Court explained:

That which constitutes incidental movement is not solely a matter of measuring feet and inches. It is a determination to be made under the facts of each case, in light of the totality of surrounding circumstances. This characterization is as much a consideration of the relation between the restraint and the homicide as it is a measure of the precise distance moved or place held. It involves an evaluation of the nature of the restraint in which distance is but one factor to be considered.

Green, 94 Wn.2d at 227.

Accordingly, a reviewing court must examine the nature and circumstances of the restraint to determine whether it is merely incidental to another criminal act.

In this case, Zalaya testified that Colon and the Clarks took him down the hall to their apartment and held him there while he was hit, and that he was then burned by Joshua Clark after Colon left. 3RP at 77. Viewing the totality of surrounding circumstances and the nature of the restraint, no reasonable juror could have found proof beyond a reasonable doubt that the restraint used was independently significant from the Clarks' assault. Accordingly, Colon's unlawful imprisonment conviction must be reversed and dismissed with prejudice.

3. **THE EVIDENCE DID NOT PROVE THAT COLON COMMITTED FELONY HARASSMENT AGAINST ZALAYA.**

Colon was charged with felony harassment of Zalaya. When a defendant is charged with felony harassment, it is not enough that the State prove the alleged victim was placed in fear. A conviction for felony harassment based on a threat to kill requires proof that the person threatened reasonably feared the threat to kill would be carried out. *State v. C.G.*, 150 Wn.2d 604, 606, 610, 80 P.3d 594 (2003). Here, there was insufficient evidence that Colon committed felony harassment. The State failed to prove beyond a reasonable doubt that Zalaya reasonably believed Colon's alleged threat to kill him if he went to the police. The State presented evidence that Colon threatened to kill him if he called the police. Although Zalaya testified that he believed that they would kill him and that he was afraid (3RP at 83), his actions do not indicate that he was afraid; after leaving the Clarks' apartment he returned to the apartment he shared with Colon and Brown and remained there until later that morning. 3RP at 83. Accordingly, the felony harassment conviction should be dismissed. Dismissal is required following reversal for insufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1081 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence). A person whose conviction has been reversed based upon

insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), *cert. denied*, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981); *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 1 (1978)).

4. **THE STATE PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THE ALLEGED AGGRAVATING FACTORS OF DELIBERATE CRUELTY AND INVASION OF PRIVACY.**

The State alleged that the assault of Zalaya was aggravated because the assault manifested deliberate cruelty to Zalaya in violation of RCW 9.94A.535(3)(a) and constituted an invasion of privacy. RCW 9.94A.535(3)(p). The jury found both aggravating factors.

The due process clause of the United States and Washington State Constitutions require proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *State v. Nicholson*, 119 Wn.App. 855, 859, 84 P.3d 877 (2003), citing *State v. Byrd*, 72 Wn.App. 774, 782, 868 P.2d 158 (1994) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). When the sufficiency of the evidence to convict the defendant of a crime is challenged on appeal, the appellate court reviews the evidence in the light

most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Hernandez*, 120 Wn.App. 389, 391-392, 85 P.3d 398 (2004), citing *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

a. The State presented insufficient evidence to establish that the assault manifested deliberate cruelty to Zalaya.

When the offender's conduct during the commission of the crime manifests deliberate cruelty to the victim, the trial court may impose an exceptional sentence. Deliberate cruelty consists of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.

To justify an exceptional sentence, the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense-elements of the crime that were already contemplated by the Legislature in establishing the standard range. *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003) (internal citations omitted).

[F]actors inherent in the crime-inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type-may not be relied upon to justify an exceptional sentence

The allegation of deliberate cruelty thus encompassed all facts and circumstances of the case. This included those facts which the State relied upon in connection with the charge of second degree assault. As pointed out in *State v. Atkinson*, 113 Wn. App. 661, 671, 54 P.3d 702 (2002): “To constitute a legal justification for imposing an exceptional sentence, the deliberate cruelty must be atypical of the crime.”

An element of the charged offense may not be used to justify an exceptional sentence. An exceptional sentence is not justified by mere reference to the very facts which constituted the elements of the offense proven at trial. *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001). For example, in *State v. Armstrong*, 106 Wn.2d 547, 723 P.2d 1111 (1986), Armstrong pleaded guilty to second degree assault based on his acts of throwing boiling coffee on a 10 month old infant and then holding the baby’s foot in the coffee. *Armstrong*, 106 Wn.2d at 548-549. The presumptive sentence range for Armstrong’s crime was 12-14 months, but Armstrong received an exceptional sentence of five years. *Armstrong*, 106 Wn.2d at 548-549. The trial court gave four reasons to justify Armstrong's exceptional sentence: (1) the victim of the assault was a totally defenseless 10-month-old child; (2) the child was injured twice, once when Armstrong threw boiling coffee on him, and a second time when Armstrong plunged the child's foot in the coffee; (3) the injuries

were very serious first- and second-degree burns to the child's body; and (4) the incident could have been avoided had Armstrong simply walked away from the crying child. *Armstrong*, 106 Wn.2d at 549. Armstrong appealed, arguing that his sentence was clearly excessive. *Armstrong*, 106 Wn.2d at 548. The *Armstrong* Court held that the first two reasons given by the trial court were sufficient to support the exceptional sentence, but held that the second two reasons were insufficient to support an exceptional sentence. *Armstrong*, 106 Wn.2d at 550. The *Armstrong* Court held that burns inflicted on the 10-month-old victim by defendant's throwing boiling coffee on the child and plunging the child's foot in the coffee were injuries already accounted for in the offense of second degree assault and could not therefore justify an exceptional sentence. *Armstrong*, 106 Wn.2d at 550-551. The Court reasoned, “[t]he fact that Armstrong inflicted serious first and second-degree burns upon the baby merely brings Armstrong's crime within the definition of second degree assault. Hence, the nature of the injuries inflicted were already accounted for in determining the presumptive sentence range for second-degree assault; they cannot be counted a second time to justify an exceptional sentence.” *Armstrong*, 106 Wn.2d at 550-551.

The present case is controlled by *Armstrong*. Here, Colon was charged with second degree assault. RCW 9A.36.021. The State alleged

that the burning of Zaylala with a knife was performed with deliberate cruelty. 6RP at 81, 88. However, as in *Armstrong*, these facts were already accounted for by the Legislature in defining the assault.

RCW 9A.36.021 provides:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or...
(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture

RCW 9A.04.110(4)(c) defines great bodily harm as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.”

The Legislature has already accounted for the burns in defining the underlying assault. As in *Armstrong*, despite the nature of the assault that took place, the act brought the action within the definition of second degree assault. The burning was an element of the underlying crime—pain or agony equivalent to torture—and therefore could not be the basis for an aggravating factor.

Because the Legislature already accounted for the pain caused by the burning in defining the underlying crime, the manner in which the assault was delivered and the severity of the injuries suffered as a result of

the burning cannot serve as the basis for an aggravating factor. The State therefore presented insufficient evidence to establish that Colon or an accomplice assaulted Zalaya in a manner that manifested deliberate cruelty.

b. The State presented insufficient evidence to establish that Colon's invaded Zalaya's privacy.

The jury also found that Colon violated Zalaya's privacy when he committed the offenses. The argument of the prosecutor during closing was that "they invaded and attacked him in a place, meager as it may be, but in a place that to Rigoberto was his home." SRP at 88. There was no showing, however, that Colon entered into a private residence or private area controlled by Colon. Instead, he was in the apartment that Zalaya, Colon and Brown all shared. Colon was permitted to be inside his own apartment. The initial incident alleged by Zalaya took place in Colon's apartment, and therefore was not a violation of Zalaya's privacy. Moreover, Colon was acquitted of kidnapping, robbery, and second degree assault as alleged in Count 3, all of which were alleged to have occurred in the apartment Zalaya shared with Colon and Brown.

Even if Colon entered an area that was his zone of privacy, the act was already part of the commission of unlawful imprisonment. Case law

suggests that entry into an area that belongs to another may be already factored into the crime. For instance, invasion of a victim's "zone of privacy" inheres in the crime of burglary. *State v. Lough*, 70 Wn. App. 302, 336, 853 P.2d 920 (1993), affirmed, 125 Wn.2d 847, 889 P.2d 487 (1995). Because unlawful entry into the victim's home is an element of that crime, "invasion of the victim's zone of privacy cannot be used as a basis for imposition of an exceptional sentence" for a burglary offense. *State v. Post*, 59 Wn. App. 389, 401-402, 797 P.2d 1160 (1990), affirmed, 118 Wn.2d 596, 826 P.2d 172, 837 Wn.2d 599 (1992). The court therefore erred in relying on the finding of the jury that there was an "invasion" of Zalaya's privacy, in ordering the exceptional sentence.

5. THE TRIAL COURT'S FAILURE TO DEFINE "INVASION OF PRIVACY" FOR THE JURY REQUIRES REVERSAL OF COLON'S AGGRAVATED EXCEPTIONAL SENTENCE.

The Supreme Court has recognized that the standard for clarity in jury instructions is higher than for statutes because a jury lacks the interpretive tools employed by courts to interpret confusing language. *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). As such, jury instructions must make the applicable legal standard manifestly clear. *Id.*

The term "particularly vulnerable victim" as used in RCW 9.94A.535 has a specific legal meaning.² Colon's jury, however, was never provided with an instruction making clear the applicable legal standard for finding the State proved this sentence aggravator beyond a reasonable doubt. Therefore, reversal of Colon's aggravated exceptional sentence is warranted.

The trial court's instructions to the jury for consideration of the alleged aggravating factor failed to make the legal standard manifestly clear. No instruction specifically addresses "invasion of privacy," and in fact the only reference to invasion of privacy was the Special Verdict Form E and the prosecutor's argument that the jury "[f]ind that they abused Rigoberto's privacy, that they invaded and attacked him in a place, meager as it may be, but in a place that to Rigoberto was his home. It may not seem like much to you or I, but it was about all he had." 5RP at 88.

The trial court's instructions regarding the alleged aggravating factor failed to make the requisite legal standard manifestly clear for the jury. Therefore, this Court should reverse Colon's exceptional sentence.

6. COLON'S SENTENCE IS CLEARLY EXCESSIVE

Under RCW 9.94A.585(4), to reverse a sentence that is outside the

² RCW 9.94A.535(3)(p) provides as an aggravating factor that "[t]he offense involved an invasion of the victim's privacy."

standard sentence range, the reviewing court must find: (a) either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient. Prior to *Blakely*,³ our Supreme Court established a three-part analysis to review the trial court's findings and conclusions, justifying an exceptional sentence under RCW 9.94A.585.

First, the court must determine if the record supports the reasons given by the sentencing court for imposing an exceptional sentence. As this is a factual inquiry, the trial court's reasons will be upheld unless they are clearly erroneous. The appellate court must next determine, as a matter of law, whether the reasons given justify the imposition of an exceptional sentence. The sentencing court's reasons must be "substantial and compelling." Former RCW 9.94A.120(2) [(2000)]. Finally, the court is to examine whether the sentence is clearly excessive or clearly lenient under the "abuse of discretion" standard. Former RCW 9.94A.210(4) [(2000)]. *State v. Hale*, 148 Wn.App. 299, 189 P.3d 829, (2008), citing *State v. Fowler*, 145 Wn.2d 400, 405-406, 38 P.3d 335 (2002).

Post-*Blakely*, an appellate court employs a three part test when

³*Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2003).

examining a trial court's imposition of an exceptional sentence after the jury finds aggravating circumstances. *Hale*, 148 Wn.App. at 300.

Under the first prong, instead of determining whether the record supports the reasons the sentencing court gave for imposing an exceptional sentence, we must review whether the record supports the jury's special verdict on the aggravating circumstances.

...

We next review de novo whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling.

...

Finally, we examine whether the trial court abused its discretion by imposing a sentence that is clearly excessive.

Hale, 148 Wn.App. at 300.

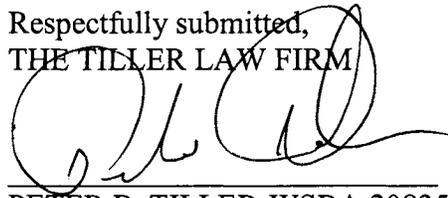
a. The trial court's reasons for imposing an exceptional sentence were not substantial and compelling.

The trial court's reasons for imposing the exceptional sentence were the special verdicts found by the jury. Again, as discussed above, the facts of the case do not support the jury's finding that the aggravating factors existed, and in the case of the aggravating factor of "invasion of privacy," the jury received no instruction whatsoever. Therefore, because the court's reason for imposing the exceptional sentence is based on the jury's finding of the aggravating factors, and since the facts of the case do not support the jury's findings that the aggravating factors existed, the trial

standard range sentence for that conviction is appropriate, either because the State had no legal authority to charge and prove an aggravating factor, or because the trial court failed to properly instruct the jury for purposes of considering whether the State had proved the "invasion of privacy" aggravator. In the alternative, Colon requests that this Court find that the offenses constitute the same criminal conduct.

DATED: November 2, 2009.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. Tiller', is written over the text 'THE TILLER LAW FIRM'.

PETER B. TILLER-WSBA 20835
Of Attorneys for Appellant

court's reasons for imposing the exceptional sentence are not substantial or compelling.

- b. **The trial court abused its discretion in imposing a sentence that is clearly excessive.**

A sentence is clearly excessive if it is based on untenable grounds or untenable reasons, or is an action no reasonable judge would have taken. *State v. Branch*, 129 Wn.2d 635, 649-650, 919 P.2d 1228 (1996). Again, as discussed above, the facts of the case do not support the jury's finding that the aggravating factors existed. It was therefore an abuse of discretion for the trial court to impose an exceptional sentence on the basis of the aggravating factors.

7. **THIS MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE OFFENSES CONSTITUTE THE SAME CRIMINAL CONDUCT AND THEREFORE COLON'S OFFENDER SCORE WAS MISCALCULATED.**

- a. **Crimes arising from the same criminal conduct count as a single offense for purposes of sentencing.**

RCW 9.94A.589(1)(a) provides for score calculation purposes, multiple crimes that have the "same criminal conduct" are not counted separately, but instead count as a single crime. "Same criminal conduct" is defined as crimes that have the same objective criminal intent, are committed at the same time and place, and involved the same victim.

Such crimes are not counted separately. RCW 9.94A.589; *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score may be raised for the first time on appeal. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. *State v. Ammons*, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). Here, Colon was convicted of unlawful imprisonment, second degree assault, and harassment. The trial court declined to apply the "same criminal conduct" analysis to any of the offenses. 6RP at 11. The offenses should have been considered the same criminal conduct and counted as one for purposes of calculating Colon's offender score.

RCW 9.94A.589(1) provides, in part:

(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offences, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. ... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are

committed at the same time and place, and involve the same victim. ...

There is no dispute that Zalaya is the same victim in each of the offenses. Issues of the same criminal intent and the same time and place arise as to the particular offenses.

b. Unlawful imprisonment and Harassment.

Zalaya testified that the Clark brothers and Colon threatened that if he went to the police they would kill him when they woke him up in the apartment he shared with Colon and Brown. 3RP at 73. The alleged statements occurred during a single continuous episode of assault and unlawful imprisonment. Washington courts have almost always rejected any simultaneity requirement in conducting a “same criminal conduct” analysis. *See State v. Calvert*, 79 Wn. App. 569, 903 P.2d 1003 (1995), *review denied*, 129 Wn.2d 1005 (1996) (two check forgeries occurring at the same bank on the same day treated as same criminal conduct even though it was unknown whether the checks were forged at the same time); *State v. Dolen*, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) (defendant’s convictions for child rape and child molestation, which could not have been committed at the same time, treated as same criminal conduct because the offenses were “continuous sexual behavior over a short period of time”); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997) (drug sales occurring as part of a continuous, uninterrupted sequence of conduct over a very short period of time constitute the same criminal conduct even though different drugs were involved).

Colon urges the Court to apply the furtherance test set forth in *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994) to these convictions. “[T]he furtherance test lends itself to sequentially committed crimes. Its application to crimes occurring literally at the same time is limited.” Under the facts and circumstances of Colon’s case, the alleged harassment was part of both the assault and unlawful imprisonment.

c. Second Degree Assault and Unlawful Imprisonment.

Colon submits that his convictions for second degree assault and unlawful imprisonment should be treated as the same criminal conduct. The second degree assault was not committed until after he was taken from Colon’s apartment to the Clarks’ apartment. The unlawful imprisonment furthered the assault. They occurred at the same place and essentially at the same time. The sole question is whether or not the same intent was involved. The *mens rea* for unlawful imprisonment is knowledge. The *mens rea* for second degree assault is intent. Even though both offenses have a different *mens rea*, the facts and circumstances indicate that Zalaya was intentionally restrained in the Clarks’ apartment.

RCW 9A.08.010(1)(a) states:

INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

RCW 9A.08.010(2) provides, in part:

... When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

As was discussed in *State v. King*, 113 Wn. App. 243, 295, 54 P.3d

1218 (2002):

Whether two crimes involved the same criminal intent ... is measured by determining whether the defendant's criminal intent, viewed objectively, changed from one crime to the other. [Citation omitted.]

Objective intent may be determined by examining whether one crime furthered the other or whether the crimes were a part of a recognizable scheme or plan. Colon argues that the unlawful imprisonment, harassment, and assault were so intricately related that no recognizable, objective change in criminal intent occurred and that the trial court abused its discretion finding the offenses had definite objective criminal intents.⁴

E. CONCLUSION

For the reasons contained above, Eugenio Colon respectfully requests that this Court vacate his convictions for second degree assault, unlawful imprisonment, and harassment. In the event this Court concludes any of the convictions should not be reversed, remand for imposition of a

⁴At sentencing, the State noted "a different Court found, regarding the Co-Defendants, that that was same criminal conduct. But Your Honor, clearly that is not binding upon the Court in any way. I'd ask the Court not to consider that issue. The other Judge clearly had not presided over the trial and was not as familiar with the facts, and what one Judge finds does not control what Your Honor does, in any event." 6RP at 7. Later in the hearing defense counsel noted that Joshua Clark received a sentence of eight months and Brian Clark—who had an extensive criminal history—was sentenced to 24 months. 6RP at 17.

APPENDIX A

STATUTES

RCW 9.94A.535

Departures from the guidelines.

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW

9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal

use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or

commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an

exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

RCW 9.94A.589

Consecutive or concurrent sentences.

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions

and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or

9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

RCW 9A.04.110

Definitions.

In this title unless a different meaning plainly is required:

- (1) "Acted" includes, where relevant, omitted to act;
- (2) "Actor" includes, where relevant, a person failing to act;
- (3) "Benefit" is any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary;
- (4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;
- (b) "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;
- (c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ;
- (5) "Building", in addition to its ordinary meaning, includes any

dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;

(6) "Deadly weapon" means 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;

(7) "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging;

(8) "Government" includes any branch, subdivision, or agency of the government of this state and any county, city, district, or other local governmental unit;

(9) "Governmental function" includes any activity which a public servant is legally authorized or permitted to undertake on behalf of a government;

(10) "Indicted" and "indictment" include "informed against" and "information", and "informed against" and "information" include "indicted" and "indictment";

(11) "Judge" includes every judicial officer authorized alone or with others, to hold or preside over a court;

(12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty;

(13) "Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully

exercising or assuming to exercise any of the powers or functions of a public officer;

(14) "Omission" means a failure to act;

(15) "Peace officer" means a duly appointed city, county, or state law enforcement officer;

(16) "Pecuniary benefit" means any gain or advantage in the form of money, property, commercial interest, or anything else the primary significance of which is economic gain;

(17) "Person", "he", and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;

(18) "Place of work" includes but is not limited to all the lands and other real property of a farm or ranch in the case of an actor who owns, operates, or is employed to work on such a farm or ranch;

(19) "Prison" means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest, including but not limited to any state correctional institution or any county or city jail;

(20) "Prisoner" includes any person held in custody under process of law, or under lawful arrest;

(21) "Projectile stun gun" means an electronic device that projects wired probes attached to the device that emit an electrical charge and that is designed and primarily employed to incapacitate a person or animal;

(22) "Property" means anything of value, whether tangible or intangible, real or personal;

(23) "Public servant" means any person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function;

(24) "Signature" includes any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto;

(25) "Statute" means the Constitution or an act of the legislature or initiative or referendum of this state;

(26) "Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe;

(27) "Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or

(b) To cause physical damage to the property of a person other than the actor; or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships;

(28) "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail;

(29) Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular.

RCW 9A.36.021

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

(2)(a) Except as provided in (b) of this subsection, assault in the second

degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.40.040

Unlawful imprisonment.

(1) A person is guilty of unlawful imprisonment if he knowingly restrains another person.

(2) Unlawful imprisonment is a class C felony.

RCW 9A.46.020

Definition — Penalties.

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who

harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

(3) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Ca
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EUGENIO COLON III,

Appellant.

COURT OF APPEALS NO.
39246-1-II

COWLITZ COUNTY NO.
08-1-01338-1

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Eugenio Colon III, Appellant, and Ms. Susan Baur, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on November 2, 2009, at the Centralia, Washington post office addressed as follows:

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Kelso, WA 98626-1799

Mr. David Ponzoha
Clerk of the Court
WA Court of Appeals, Division II
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

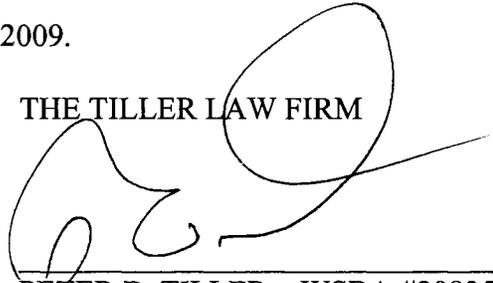
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DATED: November 2, 2009.

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. Tiller', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
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2

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