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A. ISSUES IN REPLY

1. Was the evidence presented sufficient for a reasonable jury to find the appellant acted as accomplice to assault?

2. May a challenge to sufficiency of the evidence be raised for the first time on appeal?

B. ARGUMENTS IN REPLY

1. **THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR ASSAULT.**

In its response, the State argues that it presented sufficient evidence for a reasonable jury to find that Colon acted as an accomplice to the Clarks' assault of Zayala. Brief of Resp. at 3-5. Specifically, the State argues that "[t]here was no evidence whatsoever that would have given the Clarks a motive to assault Mr. Zayala, while it was undisputed that the appellant had a motive to obtain four hundred dollars from the victim." Brief of Resp. at 5. The State's argument attempts to ascribe motivation to Colon, but overlooks that fact that one or both of the Clark brothers may very well have wanted to obtain money from Zayala for their own purposes independent of any motive that Colon may have had. In other words, Colon is not the only individual with motivation to obtain money from another person. Instead, we are left with the following

testimony:

1. Zalaya stated that Colon and the Clark brothers woke him up in the apartment he shared with Colon and his girlfriend. He said that “[t]hey began to hit me,” but did not testify as to whom specifically hit him. 3RP at 72-73.

2. Zalaya stated that “they were gonna kill me.” 3RP at 73.

3. Zalaya stated that Colon took his wallet containing \$12.00 while he was held up against a wall in the apartment, and that he wanted “maybe three or four hundred dollars.” 3RP at 73-74.

4. Zayala stated that Colon and both Clark brothers pushed Zayala into the Clarks’ apartment. 3RP at 74-75.

5. Zayala stated that in their apartment, the Clarks were holding him by his arms while he was standing. 3RP at 76.

6. He stated one of the Clark brothers hit him. 3RP at 76.

7. He stated Joshua Clark heated a knife with a lighter and held it close to Zayala’s ear, and that Colon left the apartment at that point. 3RP 76-77, 4RP at 25, 26.

8. Officer Blanchard testified that Colon told him that he told Brown that “his boys had taken care of Rigoberto” and that Colon had told Brown that “his boys had burned Mr. Zayala.” 4RP at 20.

The State failed to present any evidence that Colon directed,

encouraged, commanded, or assisted the Clarks in an assault of Zalaya with the knife. The record 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. The State's contention that it presented sufficient evidence that Colon was an accomplice to assault, even when viewed in a light most favorable to the State, is not supported by the paucity of evidence that Colon knew beforehand that the Clarks would assault Zalaya, or that he assisted or directed them to do so. At best, the evidence shows that he was aware of the assault after the fact and that he had informed Brown that "his boys" had burned him. His knowledge of the incident and his past-tense statement to Officer Blanchard that he had told Brown of the incident does not constitute accomplice liability.

2. **A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE MAY BE RAISED FOR THE FIRST TIME ON APPEAL, AND THEREFORE THIS COURT SHOULD CONSIDER COLON'S ARGUMENT THAT THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTION FOR UNLAWFUL IMPRISONMENT**

The State the State contends that this Court should not address the argument raised in Section 2 of the appellant's opening brief because it was not raised at trial. Brief of Respondent at 7-12.

Counsel framed the argument that the State presented insufficient evidence to support a separate conviction for unlawful imprisonment. The appellant argues that any restraint of Zayala's ability to move was incidental to any assault by the Clark brothers.

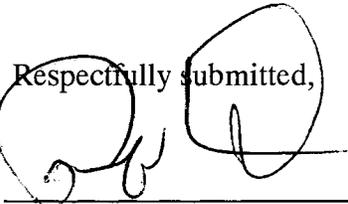
This Court should reject the State's response that this issue should not be considered for the following reasons:

First, the sufficiency of the evidence to support a conviction is a manifest error affecting colon's constitutional rights, which may be raised for the first time on appeal. RAP 2.5(a)(3); *see State v. Alvarez*, 128 Wn.2d 1, 10, 904 P.2d 754 (1995) (sufficiency of the evidence may be raised for the first time on appeal). Second, Washington courts liberally interpret the appellate rules "to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Justice could hardly be promoted by affirming a conviction based on insufficient evidence; it is a foundational premise of our criminal justice system that convicting an innocent person, and affirming that conviction, is not just. Third, this Court should review Colon's challenge in the interest of judicial economy since Colon could potentially raise this issue in a personal restraint petition (PRP). *See, e.g., State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); *State v. Davis*, 79 Wn. App. 591, 593, 904 P.2d 306 (1995).

C. CONCLUSION

Based on these arguments, and the arguments contained in his previously-filed brief, Colon respectfully requests that this court vacate his convictions for second degree assault, unlawful imprisonment, and harassment, or, alternatively, reverse and remand for imposition of a standard range sentence for reasons contained in his opening brief.

DATED this 16th day of April, 2010.

Respectfully submitted,


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DIVISION II

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STATE OF WASHINGTON

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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 Appellant's Reply Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Eugenio Colon III, Appellant, and Mr. James Smith, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 16, 2010, at the Centralia, Washington post office addressed as follows:

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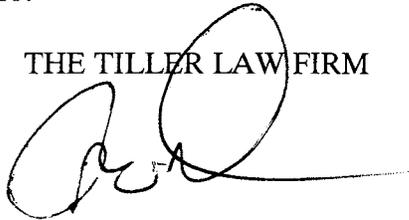
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A handwritten signature in black ink, appearing to read 'P. Tiller', written over a horizontal line.

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