

COA NO. 40805-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

OSCAR ESCOBAR,

Appellant.

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STATE OF WASHINGTON
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CLERK OF COURT

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

The Honorable Brian Tollefson, Judge

OPENING BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's kidnapping conviction.

2. Insufficient evidence supports appellant's second degree assault conviction.

3. Appellant received ineffective assistance of counsel.

4. Appellant's right to jury unanimity was violated in relation to the first degree burglary and first degree robbery convictions.

5. The trial court erred in instructing the jury on an uncharged alternative means of committing the crime of first degree robbery.

6. The information charging first degree robbery is defective because it omits an element of the offense.

7. The trial court erred in failing to give the jury a "true threat" instruction for the crime of felony harassment.

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

9. The trial court erred in failing to vacate appellant's conviction for second degree assault on the basis of double jeopardy.

10. Appellant was sentenced on counts II and V using an incorrect offender score.

Issues Pertaining to Assignments of Error

1. Does insufficient evidence support appellant's conviction for kidnapping because the restraint was incidental to the assault or robbery?

2. Is there insufficient evidence of the "deadly weapon" element of the crime of second degree assault? Was defense counsel ineffective in failing to prevent evidence from being considered as substantive evidence of guilt on this point?

3. If there is insufficient evidence that appellant was armed with a deadly weapon as an alternative means of committing first degree burglary and first degree robbery, must those convictions be reversed for lack of jury unanimity on alternative means?

4. Does the "to convict" instruction for robbery containing an uncharged alternative means of committing the crime require reversal of the conviction?

5. A charging document must properly notify a defendant of the charges against him. Is reversal required because the information specified one means of committing the crime of robbery but failed to allege an alternative means for which appellant was convicted?

6. Is reversal of the felony harassment conviction required because the jury instruction did not define "true threat" and the error was not harmless beyond a reasonable doubt?

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

8. 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? Further, did the court err in allowing the second degree assault conviction to contribute to the offender score for counts II and V?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Oscar Escobar with first degree kidnapping (count I), first degree burglary (count II), first degree robbery (count III), second degree assault (count IV), felony harassment (count V) and violation of the duty to remain at the scene of a vehicle accident (count VI). CP 6-9. After the State rested its case, the court dismissed count VI based on insufficient evidence. 1RP¹ 473-77. The jury returned guilty verdicts on counts I through V. CP 56-60.

¹ The verbatim report of proceedings is referenced as follows: 1RP - nine consecutively paginated volumes consisting of 11/23/09, 11/24/09, 11/30/09, 12/1/09, 12/2/09, 12/14/09, 12/15/09, 12/16/09, 5/21/10; 2RP - 12/9/09.

Escobar had an offender score of zero going into trial. 1RP 660. The court ordered 89 months of confinement for counts I and II, 75 months for count III, and 16 months for count V. CP 71. The court did not impose a period of confinement for second degree assault (count IV) on the ground that it "merged" with the kidnapping and robbery offenses. CP 68; 1RP 651, 653, 657. It did, however, include the second degree assault as a current offense in calculating the offender score for counts II (burglary) and V (harassment). CP68; 1RP 657. This appeal follows. CP 79-92.

2. Trial

During the early evening of February 4, 2008, Rigoberto Hernandez was in his apartment, which he shared with his brother. 1RP 220. Hernandez answered a knock at the door. 1RP 221. An unknown man, later identified by Hernandez as Oscar Escobar, asked for "Justin." 1RP 221-22, 253-54. Hernandez said he did not know "Justin." 1RP 222. While outside the door, Escobar twice said he was not playing around, he wanted to know where Justin was, that he wanted to kill Justin, and that he would kill Hernandez if he did not tell him where Justin was. 1RP 224-25.²

² Hernandez later testified this statement was made after the man entered the apartment. 1RP 267.

Escobar said he had "two guns." 1RP 224, 290. According to Hernandez, Escobar showed a gun. 1RP 264, 268. When asked to describe the gun, Hernandez replied "Well, I don't know -- the truth is I don't know much about weapons but it was small." 1RP 225. Hernandez did not remember its color. 1RP 225. He did not know the difference between a revolver and an automatic. 1RP 225. He did not know much about guns. 1RP 251. He did not know if it was plastic or metal. 1RP 251, 275. He only saw the shape of a gun. 1RP 275. He did not know if the gun was cocked or had bullets in it. 1RP 275. He did not know if it was a real gun or a toy gun. 1RP 275.

Escobar entered the apartment into the hallway. 1RP 225-26, 266. The entrance door to the apartment remained open. 1RP 229, 273. Escobar put the gun to Hernandez's head. 1RP 225-26, 264, 266. Escobar said if he killed Hernandez, he would take off with the money he had in his pocket. 1RP 232. They walked to the kitchen, where Hernandez gave Escobar a phone from the counter at his direction. 1RP 226, 228, 269-70.

Escobar dialed a number. 1RP 229. A female answered. 1RP 229. Escobar held the phone and told Hernandez to ask her out, which he did. 1RP 229-30, 233. Escobar held a gun to Hernandez's head. 1RP 232, 270. Escobar told Hernandez what to say. 1RP 230-31. The woman eventually

hung up. 1RP 231. This phone conversation took place in the entranceway to a bedroom. 1RP 233, 274-76.

Escobar, disbelieving Hernandez's denial of knowing Justin, opened the door to the second bedroom and looked inside. 1RP 233-34. Hernandez followed Escobar to the second bedroom at gunpoint. 1RP 234.³ Escobar held a gun to Hernandez's head the whole time they walked around the apartment. 1RP 269, 279, 301. When Escobar turned to open one of the closet doors at the entrance of the hall and lowered his gun, Hernandez ran out of the apartment and down the stairs. 1RP 234-35, 277, 279, 300-01.

Hernandez located his brother and a friend in a car parked in the apartment complex and told them to drive off. 1RP 239-40. Hernandez saw a Mitsubishi Eclipse following them on the street.⁴ 1RP 241. Hernandez claimed the person driving the Mitsubishi was the same person inside his apartment because he saw this person standing next to the Mitsubishi in the parking lot as they drove off at 20 to 30 miles per hour. 1RP 241, 243, 289. Hernandez claimed he could see the man inside the car. 1RP 300. He could not recall if the windows were tinted. 1RP 299.

³ Later testimony omitted any mention of going to a second bedroom. 1RP 277-79, 281-82.

⁴ Hernandez categorically denied following the Mitsubishi. 1RP 293. A police officer reported Hernandez had said he was following a Mitsubishi at various locations. 1RP 415-17.

Hernandez called 911. 1RP 244. They lost sight of the car and eventually drove into a gas station, where police arrived. 1RP 246-48. Hernandez identified the man inside the apartment from a photo shown by an officer. 1PP 251-52, 360-61. He did not know the license plate number of the Mitsubishi, but relayed the report of an acquaintance regarding someone spinning the wheels of a similar car in the street.⁵ 1RP 298-99. The plate number was linked to Escobar. 1RP 360.

When Hernandez returned to his apartment, the only thing missing was his phone. 1RP 250. The phone was never recovered. 1RP 330-31, 365-66, 414, 432, 435.

Morgan Bell, a resident of the apartment complex, was in the parking lot on the night of February 4 when he saw a man run down the steps and away without saying anything. 1RP 188-89, 209. A short time later, a second man calmly walked down the stairs with a cordless phone in his hand. 1RP 190-91, 197-98, 202-03. Bell thought the second man was asking where the other person went, so he pointed in that direction and said "that way." 1RP 191-92. The second man then walked back up the stairs. 1RP 192. Some time later Bell saw the second man walking in

⁵ It is unclear where this car spinning its wheels was located in relation to the events at issue. 1RP 297-99.

the direction of the man who had run off. 1RP 192-93. Bell did not see a gun at any point. 1RP 197.

At some point later, Bell was "almost" hit by a dark green Mitsubishi speeding out of the complex as he was backing his car out of his spot in the parking lot. 1RP 185-86. Bell could not see the driver because the Mitsubishi had tinted windows. 1RP 207. Bell said the Mitsubishi "also" collided with another car on the way out of the complex. 1RP 185. Bell told police that he did not think there was enough time for the second man to run around the corner and get in his car. 1RP 206. Bell did not know if the second man was in the Mitsubishi. 1RP 207. Bell was unable to pick anyone out of a police lineup as the second man he saw at the apartment complex. 1RP 195-96, 207-08, 212-13.

Escobar drove to mother-in-law Rita McDonald's house that night. 1RP 102, 106. McDonald testified Escobar was extremely drunk. 1RP 109-10. He was also angry about his wife's friend, Justin. 1RP 110. Escobar thought his wife was going to visit Justin. 1RP 111. Escobar also told McDonald that he went over there to scare Justin to make him stay away from his wife. 1RP 115-16. Escobar did not have a weapon on him when he came to McDonald's house. 1RP 134. He referred to his muscles as "guns." 1RP 158-59.

Police arrested Escobar at McDonald's house. 1RP 106. Police interviewed her that night. 1RP 104. McDonald testified at trial that she told police during the interview that Escobar had told her that he went over there with a gun, although she waffled on the point of whether her statement to police was accurate. 1RP 125-29, 135-37, 149-52. No gun was ever found. 1RP 330, 344, 365-66, 401-02, 414, 432, 434.

Acting on the license plate information provided by Hernandez, police went to McDonald's mobile home. 1RP 335-37, 357-58. Police took Escobar into custody after observing him walk from the home to a Green Mitsubishi Eclipse. 1RP 326, 329, 337-39. In the back of the police car, Escobar told Officer Jeff Martin that he had done nothing wrong. 1RP 371.

At 12:15 a.m. on February 5, Martin interrogated Escobar at the police department. 1RP 371, 447. Martin smelled alcohol on Escobar, but opined his level of impairment did not hinder his ability to conduct a normal conversation. 1RP 381-83, 446-47.

According to Martin, Escobar said he went to the apartment looking for Justin. 1RP 389. Escobar said Justin had earlier broken into his apartment. 1RP 389. He also said he was a jealous man and that he was jealous of Justin. 1RP 389. The involved female was Escobar's wife. 1RP 390. Escobar also talked about Justin being a sex offender. 1RP 394-

95. Martin quoted Escobar as saying "I f---ed up, okay. I went into the apartment looking for Justin. I'm a jealous man. I asked the guy where he was. He told me Justin didn't live here -- he didn't live there and I didn't believe him." 1RP 400-01. Escobar also said "I'm sorry for what I did. I made a mistake. Take me to jail." 1RP 404-05.

Escobar did not admit he used a handgun during the encounter. 1RP 401. He may have implied that he had a gun with his hand. 1RP 402-03, 450.

Martin maintained the interrogation was not recorded. 1RP 376. Officer Mike Johnson was present during the interrogation. 1RP 462. Johnson testified the interview was recorded. 1RP 468, 471-72. Johnson remembered Martin starting the tape recorder. 1RP 472.⁶

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE KIDNAPPING AS A SEPARATE CRIME UNDER THE INCIDENTAL RESTRAINT DOCTRINE.

The evidence was insufficient to convict Escobar of kidnapping because the restraint was in furtherance of and incidental to the assault or

⁶ Defense counsel moved to dismiss based on destruction of evidence. 1RP 489-500, 505-06. The trial court denied the motion on the ground that there was no prosecutorial misconduct and no bad faith under Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). 1RP 499-500, 510-12.

robbery. The kidnapping conviction must therefore be vacated and dismissed with prejudice.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). A challenge to the sufficiency of evidence may be raised for the first time on appeal as manifest constitutional error. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

The "to convict" instruction for first degree kidnapping included the element that "the defendant abducted that person with intent to facilitate the commission of the assault in the second degree or flight thereafter." CP 23 (Instruction 8). Defense counsel moved to dismiss count I, the kidnapping charge, at the close of the State's case. 1RP 477, 488. The prosecutor argued the robbery involving taking of the phone was incidental to the act of moving Hernandez around the apartment at gunpoint. 1RP 487-88. The court denied the motion to dismiss. 1RP

487-89, 533-34. The court only considered whether the kidnapping was incidental to the robbery, not whether the kidnapping was incidental to the assault. Id.

The incidental restraint doctrine is not limited to the crime of robbery. It is applicable to other crimes. "Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction." State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760 (2010); see, e.g., State v. Green, 94 Wn.2d 216, 227-28, 616 P.2d 628 (1980) (where defendant grabbed victim, carried her 50-60 feet, placed her behind building and killed her there, insufficient evidence of kidnapping because the restraint and movement of the victim was merely "incidental" to homicide rather than independent of it).

To establish a defendant committed the offense of first degree kidnapping, the State must prove that the defendant intentionally abducted another person. RCW 9A.40.020. Abduction is a "critical element in the proof of kidnapping." Green, 94 Wn.2d at 225. "Abduct" means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "Restrain" means "to restrict a person's movements without consent" and "'restraint' is 'without consent' if it is accomplished by . . . physical force, intimidation, or deception." RCW 9A.40.010(1).

But "the mere incidental restraint and movement of [a] victim during the course of another crime" is insufficient to show a separate kidnapping crime where the movement and restraint had "no independent purpose or injury." State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995) (kidnapping not incidental to murder where defendant planned to kidnap random victim and was in the course of kidnapping victim when the plan went awry, resulting in murder). In other words, to sustain a conviction for kidnapping, the restraint must be incidental to the commission of the kidnapping that has an independent purpose and effect, not merely incidental to commission of another crime.

Whether the kidnapping is incidental to the commission of another crime is a fact-specific determination. Elmore, 154 Wn. App. at 901 (citing Green, 94 Wn.2d at 225-27; State v. Korum, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2007)). To affirm the kidnapping conviction, sufficient evidence must show Escobar restrained and moved Hernandez for a purpose independent from his intent to assault Hernandez or commit robbery. No such evidence appears in this record.

The evidence shows Escobar assaulted Hernandez by pointing a gun at him upon entering the apartment and continued the assault in the same manner as he moved Hernandez about the apartment. 1RP 225-26,

232, 264, 266, 269, 270, 279, 301. Escobar restrained Hernandez to further the assault. In addition, Escobar took Hernandez's phone at gunpoint. 1RP 269, 279, 301. Escobar restrained Hernandez to further the robbery. The evidence does not show any plan to kidnap Hernandez, nor does it show he moved Hernandez about the apartment at gunpoint with any criminal purpose independent of the assault or robbery. The restraint was part and parcel of the assault and robbery.

Korum is instructive. In Korum, this Court held as a matter of law that the kidnapping convictions were incidental to the robberies and therefore not supported by sufficient evidence because (1) the restraint used was for the sole purpose of facilitating the robberies; (2) forcible restraint is inherent in armed robberies; (3) the restrained victims were not moved away from their homes; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint was not substantially longer than the commission of the robberies; and (5) the restraint did not create danger independent of the danger posed by the armed robberies themselves. Korum, 120 Wn. App. at 707.

Those same features are present in Escobar's case.⁷ The restraint used on Hernandez (pointed gun) was for the sole purpose of facilitating the assault and robbery inside his apartment. Forcible restraint is inherent in assault with a deadly weapon as well as committing robbery while being armed with a deadly weapon or displaying what appears to be a deadly weapon. Hernandez was restrained so that Escobar could continue the assault or complete the robbery. Cf. State v. Washington, 135 Wn. App. 42, 50-51, 143 P.3d 606 (2006) (sufficient evidence supported restraint element of unlawful imprisonment where assault was a reaction to the victim's resistance to the restraint and thus the restraint was not merely incidental to the assault).

Hernandez was not moved away from his apartment that he shared with his brother but rather moved from room to room within the apartment. 1RP 220, 225-26, 228, 233-34, 266, 274, 276. He was therefore not secreted to a place where he was unlikely to be found. In fact, the door to Hernandez's apartment remained open during the entire duration of the incident. 1RP 229, 273. The duration of the restraint was not substantially longer than the commission of the assault or robbery. Indeed,

⁷ Ironically, the trial court directed the parties' attention to Korum as the case most on point. 1RP 486, 488-89. The court rejected defense counsel's motion to dismiss apparently based on the mistaken belief that the kidnapping statute had been changed after Korum. 1RP 533-34.

the assault and restraint ended simultaneously when Hernandez fled the apartment. 1RP 234-35, 277, 279, 300-01.

Finally, Hernandez's restraint, consisting of being held at gunpoint, did not endanger him above and beyond the danger posed by the second degree assault itself, which consisted of assaulting Hernandez with a deadly weapon. The same goes for the armed robbery, where Hernandez was confronted with deadly weapon or what appeared to be a deadly weapon. Hernandez did not suffer any injury distinct from that inflicted by the assault and robbery. Cf. State v. Saunders, 120 Wn. App. 800, 818-19, 86 P.3d 232 (2004) (where defendant handcuffed and shackled victim and taped her mouth shut, kidnapping not merely incidental to rape because restraint went above and beyond that required or even typical in the commission of rape).

While movement of the victim occurred, the mere incidental restraint and movement of a victim which might occur during the course of another crime are not, standing alone, indicia of a true kidnapping. Green, 94 Wn.2d at 227 (citing People v. Adams, 389 Mich. 222, 236, 205 N.W.2d 415 (Mich. 1973)) (under kidnapping statute, a movement of the victim does not constitute an asportation unless it has significance independent of the assault). Here, there was no intentional abduction independent of the assault or robbery.

When the only evidence presented to the jury demonstrates that the restraint is merely incidental to completing another crime, the jury has not received sufficient evidence to convict the defendant of a separately charged kidnapping. Korum, 120 Wn. App. at 707. Escobar's conviction for first degree kidnapping must be reversed and the charge dismissed with prejudice due to insufficient evidence. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The prohibition against double jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE CONVICTION FOR SECOND DEGREE ASSAULT MUST BE VACATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT ESCOBAR COMMITTED THE ASSAULT WITH A DEADLY WEAPON.

The deadly weapon element of second degree assault is unsupported by substantial evidence. The conviction must therefore be reversed based on insufficiency of the evidence. U.S. Const. amend. XIV; Winship, 397 U.S. at 364; Smith, 155 Wn.2d at 502.

- a. The State Failed To Prove The Gun Was A Deadly Weapon Under The Circumstances In Which It Was Used.

After the State rested its case, the defense moved for dismissal of count IV, the second degree assault charge, based on insufficient evidence

for the deadly weapon element. 1RP 477, 506-10. The trial court denied the motion. 1RP 483, 510.

Consistent with RCW 9A.36.021(1)(c), the "to convict" instruction for second degree assault required the State to prove beyond a reasonable doubt that "the defendant assault R. Hernandez with a deadly weapon." CP 29 (Instruction 14).⁸

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."

Instruction 19 provided "Deadly weapon means any firearm, whether loaded or unloaded, 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 injury." CP 34. Instruction 19 is a hybrid of WPIC 2.06 and 2.06.01.⁹

⁸ The instruction defining the crime of second degree assault is consistent with the "to convict" instruction. CP 28 (Instruction 13).

⁹ The usage note to WPIC 2.06 provides "When a 'deadly weapon' is part of an element of the crime, and the only weapon alleged is a firearm or an explosive, use the instruction above (WPIC 2.06). When the weapon alleged is other than a firearm or explosive, use WPIC 2.06.01. . . . For a

At the outset, it is important to keep in mind the distinction between assault with a deadly weapon versus what "appears" to be a deadly weapon. State v. Carlson, 65 Wn. App. 153, 158, 160-62, 828 P.2d 30, review denied, 119 Wn.2d 1022, 838 P.2d 690 (1992). The State needed to prove an actual deadly weapon, not merely a weapon that looked like a deadly weapon. Carlson, 65 Wn. App. at 160-61. The State must prove beyond a reasonable doubt the presence of a deadly weapon *in fact*. State v. Mathe, 35 Wn. App. 572, 668 P.2d 599 (1983), aff'd on other grounds, 102 Wn.2d 537, 688 P.2d 859 (1984). The State failed to prove Escobar assaulted Hernandez with a "deadly weapon" in fact.

Weapons can be per se deadly (i.e., explosives and firearms), or deadly because capable of causing death or substantial bodily harm under the circumstances. Carlson, 65 Wn. App. at 158, 161 (BB gun is not a per se deadly weapon, at least where there is no evidence showing its operability). Instruction 19 defined "deadly weapon" to include a firearm only if it was capable of causing death or substantial bodily harm under the circumstances. CP 34. Instruction 19 does not treat a firearm as a per se deadly weapon. The issue of whether the object used by Escobar constituted

case involving both a firearm under WPIC 2.06 and a weapon under WPIC 2.06.01, the two instructions may be combined." Instruction 19 combined WPIC 2.06 and 2.06.01, but the State's theory was that only one deadly weapon was involved — the "gun" Escobar pointed at Hernandez. 1RP 580-81.

a deadly weapon was therefore a question of fact. Carlson, 65 Wn. App. at 159-60 ("If a weapon or thing is not deadly per se as defined in RCW 9A.04.110(6), whether it is nevertheless deadly in the circumstances in which it was used, i.e., whether it is 'readily capable of causing substantial bodily harm' becomes a question of fact.").

Under the "law of the case" doctrine, the parties are bound by the law set forth in the jury instructions. Tonkovich v. Department of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948); State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988) (because the State failed to object to the jury instructions they "are the law of the case and we will consider error predicated on them."). Jurors are bound as well. Pepperall v. City Park Transit Co., 15 Wn. 176, 180, 181, 45 P. 743, 46 P. 407 (1896). In determining sufficiency of the evidence, an instruction defining "deadly weapon" becomes the law of the case. State v. Braun, 11 Wn. App. 882, 884, 526 P.2d 1230 (1974), review denied, 85 Wn.2d 1001 (1975).

Consistent with Instruction 19, the State's theory of the case was not that Escobar assaulted Hernandez with a per se deadly weapon, but rather the weapon was deadly based on the circumstances in which it was used. In responding to defense counsel's sufficiency argument below, the State argued the evidence was sufficient because one could "smack somebody up the head with it and it would still be a deadly weapon." 1RP 509. In closing

argument, the prosecutor contended an unloaded gun could be a deadly weapon if "under the circumstances in which it's attempted to be used or threatened to be used it's capable of causing death or substantial bodily harm. So if it was made out of cardboard, probably not good enough, right? But a toy gun you can just bop somebody over the head with it, probably use it if it could cause substantial bodily injury." 1RP 580-81.

The object was not a per se deadly weapon under Instruction 19 and the State's theory of the case. Thus, the inherent capacity and "the circumstances in which it is used" determine whether the weapon was deadly. RCW 9A.04.110(6); State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). "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." Shilling, 77 Wn. App. at 171 (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).

In this case, there is no evidence of any physical injury being inflicted on Hernandez. Escobar did not hit Hernandez with the gun in his hand. The record further lacks substantial evidence that the "gun" was in fact "readily capable" of causing "substantial bodily harm." There was no substantial evidence that Escobar used or could have used the gun in a deadly manner.

To withstand constitutional scrutiny, the verdict against Escobar must be supported by substantial evidence that supports a finding of guilt beyond a reasonable doubt as measured by a rational trier of fact. Green, 94 Wn.2d at 220-22; State v. Jacobs, 121 Wn. App. 669, 680-81, 89 P.3d 232 (2004). Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). "In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture." State v. Prestegard, 108 Wn. App. 14, 23, 28 P.3d 817 (2001).

Viewed in the light most favorable to the State, substantial evidence does not establish the "gun" identified by Hernandez was capable of causing death or substantial bodily harm under the circumstances in which it was used. When asked to describe the gun, Hernandez replied "Well, I don't know -- the truth is I don't know much about weapons but it

was small." 1RP 225. He did not know if the gun was plastic or metal. 1RP 251, 275. He did not know if it was a real gun or a toy gun. 1RP 275.

The State argued the jury could find a deadly weapon because the gun could be used to hit Hernandez over the head. 1RP 580-81. But the necessary evidentiary support for that finding is missing. Crucially, the evidence does not show the gun was of such a weight and hardness that it could cause death or serious bodily injury if it was used as a bludgeoning instrument. Cf. Brooks v. State, 314 Md. 585, 600-01, 552 A.2d 872 (Md. 1989) (evidence insufficient to establish lightweight toy plastic pistol was a deadly weapon where no evidence to suggest that it was of sufficient weight or heaviness to permit the conclusion that it could be used as bludgeon to inflict serious harm and was not actually used in a way likely to inflict that sort of harm); State v. Brown, 101 Ohio App.3d 784, 788-89, 656 N.E.2d 741 (Ohio Ct. App. 1995) (no evidence adduced that the BB gun was ever used or threatened to be used as a bludgeon, nor could any inference of such use be made from the evidence; no evidence adduced concerning the particular BB gun's capability of inflicting death, either as a bludgeon or otherwise.); State v. Hicks, 14 Ohio App.3d 25, 26, 469 N.E.2d 992 (Ohio Ct. App. 1984) (toy pistol qualified as deadly weapon where police officers testified the toy was metal, of light or medium weight, similar to a .25 or small .38 caliber handgun); see also State v.

Majors, 82 Wn. App. 843, 847, 919 P.2d 1258 (1996) ("We acknowledge that a BB gun will not be capable of causing death or serious injury in most situations.").

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The record lacks substantial evidence that the "gun" held by Escobar was capable of causing death or serious injury.

b. Counsel Was Ineffective In Failing To Limit Or Object To Certain Evidence Related To The Deadly Weapon Element Of The Crime.

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

prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Id.

During the State's direct examination, Hernandez testified he did not know the difference between a revolver and an automatic. 1RP 225. On cross-examination of Officer Martin, defense counsel elicited Martin's testimony that Hernandez had reported to another officer shortly after the incident that "the subject" produced a black semiautomatic handgun. 1RP 452-53. Defense counsel's closing argument suggests he elicited this evidence from Martin to impeach Hernandez. 1RP 618. In rebuttal argument, the prosecutor treated this evidence as an attempt to impeach Martin. 1RP 637-38.

Elicitation of evidence that Hernandez had earlier described the gun as a semiautomatic in order to impeach either Hernandez or Martin is a conceivable legitimate tactic. But no legitimate tactic justified counsel's failure to limit the effect of this evidence for its intended purpose. Specifically, counsel was ineffective in failing to request instruction limiting this evidence to its impeachment purpose. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009).

Impeachment evidence cannot properly be used as substantive evidence of guilt. State v. Clinkenbeard, 130 Wn. App. 552, 569-70, 123

P.3d 872 (2005). "Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence." Clinkenbeard, 130 Wn. App. at 569. But without a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997); see, e.g., Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983) (lack of limiting instruction allowed jury to consider contents of hearsay letter as true).

Counsel has a duty to know the relevant law. Kyllo, 166 Wn.2d at 861. Here, defense counsel moved to dismiss the second degree assault charge on the basis of insufficient evidence for the deadly weapon element. 1RP 477, 506-10. He argued to the jury that there was insufficient evidence to prove the deadly weapon element because the State could not prove the gun was in fact a deadly weapon. 1RP 603, 606-07, 618, 620-21. Under those circumstances, it was not a reasonable trial strategy to fail to request a limiting instruction for the impeachment evidence so that it could not be used as substantive evidence that Escobar had a deadly weapon. Such a limiting instruction would have allowed defense counsel to exploit the evidence for its impeachment purpose while protecting his client from the danger that such testimony would be treated a substantive evidence of

guilt.¹⁰ The presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The record in this case rebuts the presumption of reasonable performance.

Counsel was also ineffective in failing to object to another piece of evidence on hearsay grounds. On direct examination, the State elicited McDonald's testimony that she told the police that Escobar had told her that he had taken a gun with him. 1RP 125-26, 128-29. What McDonald told police is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). What McDonald told police is an out of court statement. The State used McDonald's hearsay answer that she told police that Escobar told her that he brought a gun to prove the material fact that Escobar had a deadly weapon. 1RP 565, 566.

While the decision of whether to object may qualify as a legitimate trial tactic in situations where prejudice is slight, such failure constitutes ineffective assistance where proper objection is not lodged against testimony central to the State's case. State v. Madison, 53 Wn. App. 754,

¹⁰ In responding to defense counsel's insufficiency of evidence argument on the deadly weapon element, the prosecutor pointed to Martin's testimony reciting Hernandez's prior statement about the black semiautomatic. 1RP 509.

763, 770 P.2d 662 (1989). In State v. Hendrickson, for example, counsel was ineffective for failing to object to the admission of hearsay evidence where there was a reasonable probability the State could not have convicted the defendant but for admission of the hearsay. State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), aff'd, 165 Wn.2d 474, 198 P.3d 1029 (2009). There was no legitimate tactical reason for counsel's failure to raise a hearsay objection because the testimony enabled the State to prove elements of the crime. Hendrickson, 138 Wn. App. at 833.

Counsel should have objected on hearsay grounds to McDonald's answer that she told police that Escobar told her he brought a gun with him. Given counsel's argument that the jury could not find a deadly weapon to support the relevant charges based on the evidence, there was no justifiable reason not to lodge that objection and thereby prevent the jury from ever considering it. The evidence was indisputably damaging. After the State elicited McDonald's hearsay answer without objection, counsel on both sides spent a great deal of time trying to pin McDonald down on this point, with defense counsel trying to do damage control by pursuing the theory that she may have told the police that Escobar said he had a gun because the police planted the idea in her mind. 1RP 126, 128-29, 135-37, 149-52.

Damage control is appropriate when objection to damaging evidence is overruled. Here, competent counsel would have kept this evidence from the jury's consideration altogether by promptly lodging a hearsay objection.

The State may argue evidence of what McDonald told the police regarding what Escobar told her about a gun was only impeachment evidence, given that the prosecutor began examination of what McDonald told police by impeaching her regarding the extent of Escobar's intoxication. 1RP 123-25.¹¹ The prosecutor had already established McDonald did not want to testify against her son-in-law and earlier refused to come into court, which resulted in her arrest. 1RP 116-19. If McDonald's statement to police was impeachment evidence, then counsel should have requested a limiting instruction for the same reason he should have requested a limiting instruction for Hernandez's prior inconsistent statement.

Hernandez's prior inconsistent statement and McDonald's statement to police should not have been allowed to be considered as

¹¹ McDonald had told police Escobar was a little intoxicated, as opposed to the extremely intoxicated description she gave at trial. 1RP 123-25. McDonald explained she had since had an opportunity to observe Escobar drunk again as a point of comparison, and was able to conclude that he was extremely drunk on the night of February 4, 2008. 1RP 124, 138-39.

substantive evidence that Escobar assaulted Hernandez with a deadly weapon. Escobar's conviction for second degree assault must be reversed and the charge dismissed with prejudice because there is insufficient evidence to prove the deadly weapon element of the crime. Cf. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (reversing conviction where there was insufficient evidence to convict after inadmissible hearsay report was properly excluded from consideration).

The State may argue Escobar was not sentenced for second degree assault and therefore the conviction is harmless and without remedy. That argument fails. Regardless of whether a conviction is reduced to judgment and sentence, the fact of conviction itself constitutes a form of punishment that offends double jeopardy. State v. Turner, 169 Wn.2d 448, 454-55, 238 P.3d 461 (2010); State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007). Moreover, the trial court included the second degree assault as a current offense in calculating the offender score for counts II (burglary) and V (harassment). CP 68; 1RP 657. The offender score and corresponding sentencing range changes after the second degree assault is vacated for lack of sufficient evidence.

3. ESCOBAR'S RIGHT TO JURY UNANIMITY WAS VIOLATED BECAUSE SUFFICIENT EVIDENCE DID NOT SUPPORT EACH ALTERNATE MEANS OF COMMITTING FIRST DEGREE ROBBERY AND FIRST DEGREE BURGLARY.

There was insufficient evidence to support a finding of "armed with a deadly weapon" as the alternative means by which first degree burglary and first degree robbery could be proven. As a result, the trial court needed to either instruct the jury that it must reach unanimous agreement as to alternative means or issue a special verdict form specifying the means relied upon for each of those counts. Reversal is required because, in the absence of these measures, there was no particularized expression of jury unanimity on each of the alternative means of proving first degree burglary and first degree robbery.

Criminal defendants have a right to a unanimous jury verdict. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in article I, section 22 of the Washington Constitution. State v. Furseth, 156 Wn. App. 516, 519, 233 P.3d 902 (2010). Although the unanimity issue presented here was not raised at trial, this Court may address it for the first time on appeal under RAP 2.5(a)(3) because error involving jury unanimity is manifest

constitutional error. Furseth, 156 Wn. App. at 520 n.3; State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995).

Jury unanimity is not required on each alternative means so long as substantial evidence supports each method by which the single crime could have been committed. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). The right to a unanimous jury verdict, however, includes the right to a particularized expression of jury unanimity on the means by which the defendant committed the crime when there is insufficient evidence to support one of the means. Ortega-Martinez, 124 Wn.2d at 707-08.

"The test is whether sufficient evidence exists to support each of the alternative means presented to the jury." State v. Kinchen, 92 Wn. App. 442, 451, 963 P.2d 928 (1998). Reversal is required if the evidence is insufficient to support any one of the means submitted to the jury and there is no way to determine that the jury unanimously relied on the means for which there was sufficient evidence. Kinchen, 92 Wn. App. at 451-52.

A person may commit first degree burglary by two alternative means: (1) being armed with a deadly weapon or (2) assaulting a person while entering, inside, or fleeing from the burglarized building. RCW 9A.52.020(1)(a)-(b); see WPIC 60.02 (Comment recognizes the "armed or assaulted" alternatives of first degree burglary). The jury was instructed

on the alternative means of committing first degree burglary either by the defendant being armed with a deadly weapon or assaulting a person in entering the building or in immediate flight therefrom.¹² CP 25 (Instruction 10).

A person may commit first degree robbery by two alternative means: (1) by being armed with a deadly weapon or (2) displaying what appears to be a deadly weapon. RCW 9A.56.200(1)(a)(i) and (ii); State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385 (1989); see also WPIC 37.02 (Comment recognizes armed with deadly weapon and displaying what appears to be a deadly weapon are alternative means). The jury was instructed on the alternative means of committing first degree robbery either by the defendant being armed with a deadly weapon or displaying what appears to be a deadly weapon during the commission of the robbery or in immediate flight therefrom. CP 27 (Instruction 12).

As set forth in section C. 2., supra, the evidence is insufficient to show Escobar was armed with a "deadly weapon." That alternate means of committing first degree burglary and first degree robbery is unsupported by substantial evidence for the reasons set forth in section C. 2., supra.

¹² The amended information expressly charged the crime of first degree burglary in this alternative. CP 6-7.

If one or more of the alternative means is not supported by substantial evidence and there is only a general verdict, the verdict must be reversed unless this Court can determine that it was based on only one of the alternative means and that substantial evidence supported that alternative means. Kinchen, 92 Wn. App. at 451-52; State v. Thorpe, 51 Wn. App. 582, 586-87, 754 P.2d 1050 (1988).

"An appellate court must be able to determine from the record that jury unanimity has been preserved." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). This Court is unable to make that determination in this case. There was no particularized expression of jury unanimity on alternative means via instruction or a special verdict specifying which of the alternative means the jury found to prove first degree burglary and first degree robbery. The prosecutor argued both alternate means in urging conviction. 1RP 574-75.

"If one of the alternative methods upon which a charge is based fails, the verdict must be set aside unless the court can ascertain that it was based on remaining grounds for which sufficient evidence was presented." State v. Maupin, 63 Wn. App. 887, 894, 822 P.2d 355 (1992). The first degree burglary and first degree robbery convictions must be reversed because this Court cannot be certain that the jury unanimously relied on the alternative means that was supported by sufficient evidence.

4. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE OFFENSE OF ROBBERY.

The information charged only one means of committing the crime of first degree robbery, i.e., "the defendant displayed what appeared to be a firearm or other deadly weapon." CP 7. The "to convict" instruction for robbery allowed the jury to consider the alternative means, i.e., the defendant was "armed with a deadly weapon." CP 27. Reversal is required because the jury was allowed to convict Escobar 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 as follows:

- (1) A person is guilty of robbery in the first degree if:
 - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon; or

- (iii) Inflicts bodily injury; or
- (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200(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. Nicholas, 55 Wn. App. at 272-73.

The "to convict" instruction for first degree robbery included both alternative means, providing in pertinent part:

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

- (1) That on or about the fourth day of February, 2008 the defendant unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
- (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) *That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon;* and
- (6) That any of these acts occurred in the State of Washington.

CP 27 (Instruction 12) (emphasis added)¹³

The State, however, charged Escobar by amended information with first degree robbery by alleging only one alternative means: "the defendant displayed what appeared to be a firearm or other deadly weapon." CP 7.¹⁴ The information does not allege Escobar committed the crime by the statutory alternative of being "armed with a deadly weapon."

"One cannot be tried for an uncharged offense." State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). 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." This is an error of constitutional magnitude that may be raised for the first time on appeal. See State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (instructing jury on an uncharged alternative means violates the defendant's constitutional right to notice of the crime charged); accord State v. Laramie, 141 Wn. App. 332, 342-43, 169 P.3d 859 (2007); State v. Roggenkamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005) (failure to properly instruct on element of charged crime is an error of constitutional

¹³ The jury was also given a definition of robbery that included both statutory alternatives of being "armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon." CP 26 (Instruction 11).

¹⁴ The original information charged Escobar on this count in the same manner. CP 1.

magnitude); State v. Vanoli, 86 Wn. App. 643, 646, 937 P.2d 1166 (1997) (instructional error affecting a constitutional right may be raised for the first time on appeal under RAP 2.5(a)(3)).

"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); Doogan, 82 Wn. App. at 188.

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, when the information just alleged that 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). Nicholas, 55 Wn. App. at 272-73.

The "to convict" instruction for first degree robbery in Escobar's case was improper because it violated established law on uncharged statutory alternatives. That instruction should have omitted the statutory alternative that Escobar was "armed with a deadly weapon" because this alternative was not set forth in the charging document. Escobar had the constitutional right to be informed of the nature of the charges against him. Laramie, 141 Wn. App. at 343; U.S. Const. amend. VI; Wash. Const. art. I, § 22. If an "information alleges only one alternative . . . it is error for the factfinder to consider uncharged alternatives, regardless of the strength of the evidence presented at trial." Williamson, 84 Wn. App. at 42.

b. Reversal Is Required Because The Jury Could Have Convicted On The Uncharged Alternative Means.

Where the instructional error favors the prevailing party, "it is presumed to be prejudicial unless it affirmatively appears the error was harmless." Bray, 52 Wn. App. at 34-35. If it is possible that the jury might have convicted the defendant under the uncharged alternative, then the error is prejudicial. Doogan, 82 Wn. App. at 189; Severns, 13 Wn.2d 542, 549, 125 P.2d 659 (1942); Bray, 52 Wn. App. at 34-35.

The error here was necessarily prejudicial because, under the instructions given, the jury could have convicted Escobar of first degree robbery based on either the charged or the uncharged alternative means.

Laramie, 141 Wn. App. at 343. Indeed, the prosecutor in closing argument invited the jury to convict on either one of the alternate means: "It's robbery in the first degree. He's armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon." 1RP 574.

Such error may be harmless where subsequent instructions clearly and specifically define the crime in such a way as to limit the jury's consideration to the charged means. Severns, 13 Wn.2d at 549. The definitional instruction for robbery in Escobar's case, however, specifies both means of committing the offense. CP 26. This instruction did not limit the jury's consideration of the means by which Escobar committed the crime to that charged in the information.

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, this Court held that 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. Nicholas, 55 Wn. App. at 272-73.

Unlike Nicholas, no special verdict form in Escobar'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. Reversal of the robbery conviction is required.

5. THE INFORMATION WAS DEFECTIVE BECAUSE IT FAILED TO NOTIFY ESCOBAR OF AN ALTERNATIVE ELEMENT OF THE CRIME OF FIRST DEGREE ROBBERY.

Escobar's conviction for first degree robbery must be reversed because the charging document does not set forth the element of "armed with a deadly weapon" as an alternative means of committing the crime.

A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the well-established "essential elements" rule is to apprise the defendant of the charges against him and allow preparation of a defense. Id.

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).

Generally, the crime upon which the jury is instructed is limited to the offense charged in the information. State v. Foster, 91 Wn.2d 466, 471, 589 P.2d 789 (1979) (exception for uncharged lesser included and inferior degree crimes). Alternative means of committing the crime may be omitted from the information without depriving a defendant of notice of the charged crime. State v. Noltie, 116 Wn.2d 831, 841-42, 809 P.2d 190 (1991). However, when the information specifies one alternative means, the manner of committing a crime becomes an element. Bray, 52 Wn. App. at 34.

In State v. Tresenriter, the information charged only one means of committing the crime of burglary, i.e., with intent to commit a crime against a person. The information failed to set forth the alternative means on which the jury was instructed, i.e., with intent to commit a crime against property. State v. Tresenriter, 101 Wn. App. 486, 490, 492, 493, 4

P.3d 145 (2000). Under the Kjorsvik test, the information was inadequate to give notice of the crime charged. Id. at 489, 492.

In Williamson, the information alleged the defendant committed the crime of obstruction of a public servant by means of conduct but the trial court convicted on the uncharged alternative of obstruction by means of speech. Williamson, 84 Wn. App. at 39, 42, 44-45, 924 P.2d 960 (1996). Under the Kjorsvik test, the information failed to provide adequate notice of the alternative means ultimately considered by the trier of fact at trial. Id. at 39, 44-45.

In Escobar's case, as in Tresenriter and Williamson, the information was defective because it charged one alternative means but omitted a means for which he was ultimately prosecuted at trial. The information specified "the defendant displayed what appeared to be a firearm or other deadly weapon, to wit: a handgun, contrary to RCW 9A.56.190 and 9A.56.200(1)(a)(ii)." CP 7. The information did not give notice that the State sought to convict Escobar of first degree robbery on the alternative basis that he was "armed with a deadly weapon." CP 27. The information was therefore inadequate to give notice of the crime charged.

A charging document need not include the exact words of a statutory element; words conveying the same meaning and import are

sufficient. Kjorsvik, 117 Wn.2d at 108. But even under a liberal reading, "displaying" what "appears" to be a firearm or other deadly weapon does not mean the same thing as being "armed" with an actual deadly weapon. Those are distinct means of committing the crime. Nicholas, 55 Wn. App. at 272-73. The information specifically alleges violation of RCW 9A.56.200(1)(a)(ii) — that Escobar was guilty of robbery in the first degree if, in the commission of a robbery or of immediate flight therefrom, he "[d]isplays what appears to be a firearm or other deadly weapon." RCW 9A.56.200(1)(a)(i), which is not cited in the information, contains the specific alternative means of being "armed with a deadly weapon."

Further, "armed" and "displayed" do not mean the same thing under a common understanding of those terms. State v. Hauck, 33 Wn. App. 75, 77, 651 P.2d 1092 (1982); see Dahl-Smyth, Inc. v. City of Walla Walla, 148 Wn.2d 835, 842-43, 64 P.3d 15 (2003) (dictionaries may be consulted to determine common meaning of statutory terms). "Armed" means "furnished with weapons of offense or defense: fortified, equipped . . . furnished with something that provides security, strength or efficacy[.]" Hauck, 33 Wn. App. at 77 (citing Webster's Third New Int'l Dictionary 119 (1976)). "Display" means "to spread before the view: exhibit to the sight or mind," "an exhibiting or showing of something."

Hauck, 33 Wn. App. at 77 (citing Webster's Third New Int'l Dictionary 654 (1976)).

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the "armed with a deadly weapon" element as an alternative means of committing the crime is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Escobar's conviction for first degree robbery. McCarty, 140 Wn.2d at 425.

6. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY ON THE REQUIREMENT OF A "TRUE THREAT" FOR THE CRIME OF HARASSMENT.

Escobar's felony harassment conviction must be reversed because jury instructions did not set forth the "true threat" requirement of the crime of felony harassment.

a. The Jury Must Be Instructed That The State Must Prove A True Threat — That A Reasonable Person In The Defendant's Position Would Foresee That A Listener Would Interpret The Threat As Serious.

"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 First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely hyperbole, idle talk, or puffery. Schaler, 169 Wn.2d at 283; Kilburn, 151 Wn.2d at 43, 46.

The trial court errs in failing to instruct the jury on the "true threat" requirement. Schaler, 169 Wn.2d at 287. In Escobar's case, the "to convict" instruction stated in pertinent part:

To convict the defendant of the crime of harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the fourth day of February, 2008, the defendant knowingly threatened to kill R. Hernandez immediately or in the future;
- (2) That the words or conduct of the defendant placed R. Hernandez in reasonable fear that the threat would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the acts occurred in the State of Washington.

CP 31.

The court also instructed "Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person." CP 41 (Instruction 26).

The jury in Schaler received substantively identical instructions. Schaler, 169 Wn.2d at 285. These instructions conveyed the mens rea that the person acts intentionally as to the conduct and circumstances. Schaler, 169 Wn.2d at 286. The instructions remained inadequate, however, because no mens rea was specified as to *the result*: "[t]he jury instructions did not state that the defendant must know or foresee that the person threatened (or, for that matter, any listener) would reasonably fear that the threat will be carried out." Id. In the context of criminalizing speech, the lack of mens rea as to the result is "critical." Id. at 287.

Because the First Amendment limits the harassment statute to proscribing "true threats," it must be read to reach only those instances "wherein *a reasonable person would foresee* that the statement would be

interpreted as a serious expression of intention ... to take the life of another person." Id. (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). "This 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.

As in Schaler, the felony harassment instructions are constitutionally defective because they failed to inform the jury of the need to prove a true threat. Because the First Amendment requires negligence as to the result but the instructions here required no mens rea as to result, the jury could have convicted Escobar based on something less than a "true threat." Schaler, 169 Wn.2d at 287. As instructed, the jury was permitted to convict Escobar even if his statement was just hyperbole or puffery rather than a "true threat."

Defense counsel did not raise this error below, but the failure to instruct on a "true threat" is a manifest error affecting a constitutional right that may be raised for the first time on appeal. Schaler, 169 Wn.2d at 287. As in Schaler, the trial court here could have corrected the error given the clear state of the law at the time that it instructed the jury. Id. at 288.

Indeed, WPIC 2.24,¹⁵ which defines a "true threat," was available at the time of Escobar's trial. Id. at 288 n.5.

b. Reversal Is Required Because The Error Was Not Harmless Beyond A Reasonable Doubt.

The failure to instruct the jury on the "true threat" requirement is constitutional error. Schaler, 169 Wn.2d at 287-88 (citing State v. Brown, 147 Wash.2d 330, 340-41, 58 P.3d 889 (2002) (employing constitutional harmless error analysis)). Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Stated another way, such error is harmless only if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The reviewing court decides whether the actual verdict "was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical [trier of

¹⁵ WPIC 2.24 provides "To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in *[jest or idle talk][jest, idle talk, or political argument]*."

fact] faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999); accord Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Whether the evidence is sufficient to convict is a different question from whether a constitutional error is harmless beyond a reasonable doubt. See Schaler, 169 Wn.2d at 290-91 (reversing because instruction error not harmless but determining sufficient evidence supported verdict). An error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds. Id. at 288.

Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. Miller, 131 Wn.2d 78 at 90. The presumption of prejudice "may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The prosecution cannot overcome the presumption of prejudice here. Whether language constitutes a true threat is an issue for the trier of

fact to resolve and is determined under an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44. Under the facts of this case, a rational jury could have found Escobar's statement was not a "true threat."

Escobar went to McDonald's house that night, shortly after the incident at issue. 1RP 106, 123. McDonald described Escobar as extremely drunk and angry. 1RP 109-10, 11. McDonald agreed Escobar did "a lot of drunk talk, bragging, bravado." 1RP 139. Officer Martin, who smelled alcohol on Escobar during interrogation later that night, knew of the "drunk talk" phenomenon and agreed people embellish and say stupid things when they are a little "buzzed." 1RP 443-44. Martin agreed it was possible Escobar was involved in some kind of "buzzed drunk talk."¹⁶ 1RP 444.

From these facts the jury could infer Escobar's statements to Hernandez were hyperbole or puffery rather than serious threats to kill. The effects of alcohol upon people are commonly known and all persons can be presumed to draw reasonable inferences therefrom. State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985). While rational jurors could have concluded that Escobar's statements were serious threats

¹⁶ Defense counsel argued his client was drunk and people say stupid and outrageous things when they are drunk. 1RP 601.

and that a reasonable speaker would so regard them, they could also have concluded that Escobar's threats were mere "drunk talk."

Here, we cannot know whether the jury properly determined that Escobar's threats to kill Hernandez were "true threats" in the absence of proper instruction. The circumstances do not unequivocally and necessarily lead to a finding of true threat. Escobar's utterances were consistent with those of a drunken, jealous man lashing out at someone. In reversing conviction, the Court in Schaler court cited State v. Johnston, which suggested a drunken defendant's outbursts might not have been true threats. Schaler, 169 Wn.2d at 289 (citing State v. Johnston, 156 Wn.2d 355, 357-58, 364-65, 127 P.3d 707 (2006)); see also State v. Perkins, 237 Wis.2d 313, 323-24, 614 N.W.2d 25 (Wis. Ct. App. 2000) (drunken state of defendant allowed for inference that threat was not a true threat, but evidence, viewed in light most favorable to state, was sufficient to convict for threat to kill a judge), rev'd, 243 Wis.2d 141, 146-47, 164-65, 626 N.W.2d 762 (Wis. 2001) (failure to instruct jury on true threat required reversal).

The State cannot overcome the presumption that failure to instruct the jury on the need to find a "true threat" had no effect on the verdict. Reversal is required because the jury was not asked to decide whether a reasonable person in Escobar's position would foresee that his statements

or acts would be interpreted as a serious expression of intent to carry out the threat, and the evidence was ambiguous on the point. Schaler, 169 Wn.2d at 290.

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

Escobar's conviction for felony harassment 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; Vangerpen, 125 Wn.2d at 787.

The amended information fails to allege Escobar made a "true threat."¹⁷ CP 8. Instead, the amended information merely accuses Escobar of committing the crime of felony harassment, as follows:

That OSCAR ARMANDO ESCOBAR, in the State of Washington, on or about the 4th day of February, 2008, without lawful authority, did unlawfully, knowingly threaten Rigoberto Ramirez Hernandez to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct place the person threatened in reasonable fear that the threat would be carried out, and that further, the threat was a threat to kill the person threatened or any other person, thereby invoking the provisions of RCW 9A.46.020(2)(b) and increasing the classification of the crime to a felony, contrary to RCW 9A.46.020(1)(a)(i)(b) and 9A.46.020(2)(b)[.]

CP 8.

¹⁷ The initial information does not contain the "true threat" element. CP 2-3.

Division One 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. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230(2)(b)); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (felony harassment under RCW 9A.46.020). This Court is not bound by Division One's decisions in Tellez and Atkins. They 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, 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.

"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. It follows that a true threat is an essential element of the crime.

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 State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (quoting Black's Law Dictionary 559 (8th ed. 2004))). 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. The mens rea is a constituent element of a crime. Peterson, 168 Wn.2d at 772.

In Atkins, the court contended that defining a "true threat" for the jury (which was not done here) through instruction ensures that the jury will convict only if it deemed a threat to be a "true threat." Atkins, 156 Wn. App. at 806. That contention misses the point. The purpose of the "essential elements" rule for charging documents is to apprise the defendant of the charges against him and allow preparation of a defense. Vangerpen, 125 Wn.2d at 787; Kjorsvik, 117 at 101. The rule is rooted in

due process doctrines concerning notice. Campbell, 125 Wn.2d at 801. The rule has nothing to do with whether the jury will convict only when it finds prohibited conduct under proper instruction.

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. Because the necessary element of "true threat" is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse. McCarty, 140 Wn.2d at 425. The remedy is dismissal of the charge without prejudice. Vangerpen, 125 Wn.2d at 791.

8. THE CONVICTION FOR SECOND DEGREE ASSAULT MUST BE VACATED ON DOUBLE JEOPARDY GROUNDS AND ESCOBAR MUST BE RESENTENCED ON COUNTS II AND V.

The trial court agreed with the parties below that conviction for second degree assault violated double jeopardy because it merged with the crimes of robbery and kidnapping. 1RP 651, 653, 657. Instead of vacating this conviction, the court merely did not sentence Escobar on that count. CP 68. This was error because the mandatory remedy is vacature.

The court's failure to vacate the assault conviction led to a second error. The court allowed the second degree assault conviction to count as a "current offense" that contributed to the offender scores for counts II and

V. CP68; 1RP 657. This should not have happened because a conviction that offends double jeopardy must be vacated, thereby avoiding adverse consequences flowing from the conviction.

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

The trial court, in accordance with the parties' agreement, did not sentence Escobar for second degree assault because it determined the offense of second degree assault "merged" with the robbery and kidnapping crimes. CP 68; 1RP 651, 653, 657. The court and the parties were correct that the second degree assault merged with the first degree robbery. First degree robbery and second degree assault generally merge and are the same for double jeopardy purposes unless they have an independent purpose or effect. Freeman, 153 Wn.2d at 780; State v. Kier,

164 Wn.2d 798, 814, 194 P.3d 212 (2008); In re Pers. Restraint of Francis, __ Wn.2d __, 242 P.3d 866, 870 (2010).

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. Weber, 127 Wn. App. 879, 885, 888, 112 P.3d 1287 (2005) (citing In re Pers. Restraint of Burchfield, 111 Wn. App. 892, 899, 46 P.3d 840 (2002); Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)), aff'd, 159 Wn.2d 252, 149 P.3d 646 (2006); accord State v. Elmi, 138 Wn. App. 306, 321, 156 P.3d 281 (2007). 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 first degree robbery under double jeopardy. Francis, 242 P.3d at 870, 874.

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." Turner, 169 Wn.2d at 454. "[E]ven a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protections." Id. 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.; Womac, 160 Wn.2d at 656-58.

Escobar's conviction for second degree assault, however, goes beyond the punishment of stigma. The court used the assault conviction to pump up the offender score for counts II (burglary) and V (harassment), resulting in a higher standard range for both of those counts.¹⁸ The court then sentenced Escobar to the top of the standard range for counts II and V. CP 68. In this manner, Escobar suffered an immediate adverse consequence from a conviction that should have been given no legal effect.

A conviction that offends double jeopardy retains no validity whatsoever. Turner, 169 Wn.2d at 464. The trial court's failure to vacate the second degree assault conviction led to the further error of allowing it

¹⁸ The second degree assault conviction contributed 2 points to the first degree burglary offense (count II), resulting in offender score of "7" with a standard range of 67-89 months. See RCW 9.94A.510 (setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of VII for first degree burglary); RCW 9.94A.525(8) and (10) (prior adult felonies count as two points where present conviction is for violent offense or first degree burglary); RCW 9.94A.030(53)(viii) (second degree assault is a "violent offense"); RCW 9.94A.589(1)(a) (sentence range for each current offense determined by using other current convictions as if they were prior convictions for offender score). The second degree assault conviction contributed 1 point to the felony harassment offense (count V), resulting in an offender core of "4" and a standard range of 12+ to 16 months. See RCW 9.94A.515 (seriousness level of III for harassment); RCW 9.94A.525(7) (count one point for each adult prior felony conviction if the present conviction is for a nonviolent offense).

to contribute to the offender score as a "current offense" for counts II and V. To "vacate" means "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary 1584 (8th Ed. 2004). A vacated conviction has no legal force or effect. For all legal purposes, the vacated conviction does not exist. By definition, a vacated conviction cannot contribute to the offender score. Assuming no convictions are reversed on appeal, the correct offender score for count II is a "5" with a standard range of 41 to 54 months. For count V, the correct score is a "3" with a standard range of 9 to 12 months. This case should be remanded for entry of an order vacating the second degree assault and for resentencing on counts II and V using the correct offender score for those counts.

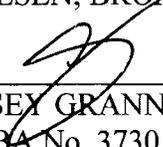
D. CONCLUSION

For the reasons stated, Escobar respectfully requests that this Court reverse the convictions. In the event this Court declines to reverse, the case should be remanded for resentencing on counts II and V.

DATED this 30th day of December 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 40805-8-II
)	
OSCAR ESCOBAR,)	
)	
Appellant.)	

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 30TH DAY OF DECEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

[X] OSCAR ESCOBAR
DOC NO. 340716
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

STATE OF WASHINGTON
BY _____ DEPUTY
11 JAN -9 9 16 15
COURT REPORTER

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2010.

x Patrick Mayovsky