

NO. 40805-8-II

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

OSCAR ARMANDO ESCOBAR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 08-1-00696-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2. Has defendant failed to show that a unanimity instruction was required when there was sufficient evidence to support each alternative means of committing robbery in the first degree and burglary in the first degree?
3. Did the court improperly instruct the jury on an uncharged alternative means of committing robbery in the first degree?
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5. Did the information contain all of the essential elements of felony harassment?
6. Did defendant receive constitutionally effective assistance of counsel where he failed to show that counsel's performance was deficient and prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On February 6, 2008, the State charged OSCAR ARMANDO ESCOBAR, hereinafter “defendant,” with one count each of first degree robbery, first degree burglary, second degree assault, unlawful imprisonment, and felony harassment. CP¹ 1-3. On March 28, 2008, the State amended the charges to one count each of 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 hit and run (Count VI). CP 6-9. After a CrR 3.5 hearing, the court found defendant’s statements to law enforcement officers admissible. RP 86.

Jury trial commenced December 1, 2009, before the Honorable Brian Tollefson. RP 96. Once the State rested, defendant moved to dismiss Counts I, II, III, IV, and VI. RP 473-76, 477. The court granted defendant’s motion to dismiss Count VI as the State had not presented evidence to show damage to property as required to prove hit and run. RP 476. The court denied defendant’s motion to dismiss Counts II, III, and IV, but reserved ruling on Count I. RP 483-84.

¹ Clerk’s Papers will be referred to as “CP.” Citations to the verbatim report of proceedings will be to “RP.”

Defendant did not put on any evidence, but moved to dismiss Counts II and IV, on the basis that the State had not proved that the gun was a deadly weapon. RP 507. The court denied the motion. RP 510.

The court instructed the jury for all counts except Count VI. *See* CP 13-55. The court included instructions for the lesser-included offenses of unlawful imprisonment, second degree burglary, second degree robbery, and fourth degree assault. CP 13-55 (Jury Instruction 27). Defendant had no objection to the jury instructions as presented. RP 352. The case went to the jury on December 16, 2009. RP 644-46. Later that same day², the jury found defendant guilty as charged. CP 56-64.

The court sentenced defendant on May 21, 2010. RP 650. At sentencing, the State conceded that the assault conviction merged into the kidnapping and robbery charges because the assault was the force that elevated each crime to first degree. CP 95-102; RP 651. However, the State argued that none of the crimes merged with the burglary, including the assault. CP 95-102. The State also argued that the robbery and kidnapping charges did not merge because defendant's intent was different for each act. CP 95-102; RP 653. Defendant argued that the kidnapping and robbery did merge because the restraint was merely incidental to the robbery. RP 653. The court found that, because defendant had different

² Defendant did not transcribe the jury's verdict, but the verdict forms were filed in open court on December 16, 2009. CP 56-64.

intents between the kidnapping and the robbery, the crimes did not merge. RP 656.

The court sentenced³ defendant to the middle of the standard range for Count I, and the high end of the standard range for Counts II, III, and V. CP 65-78; RP 663. The court ran all counts concurrent, for a total sentence of 89 months. CP 65-78; RP 663.

Defendant filed a timely notice of appeal. CP 79-92.

2. Facts

On February 4, 2008, at approximately 7:00 p.m., Rigoberto Hernandez was alone in the apartment he shared with his brother in Lakewood, Washington, when he heard a knock on this front door. RP 220-21. Mr. Hernandez opened the door to find defendant standing outside. RP 222.

Defendant asked if “Justin” was home. RP 223. Mr. Hernandez responded that he did not know anyone named Justin.⁴ RP 222. Defendant then stated that he was “not playing around.” RP 224. He wanted to know where Justin was because he wanted “to kill someone” and if he did not find Justin, defendant would kill Mr. Hernandez, instead.

³ Due to the imposition of multipliers in defendant’s sentence, his offender score for Count I was a 5, giving him a standard range of 77-102 months; Count II was a 7, with a standard range of 67-89 months; Count III was a 5, with a standard range of 57-75 month; and Count V was a 4, with a standard range of 12+-16 months. CP 65-78. Defendant was not sentenced on Count IV, the assault charge. CP 65-78.

⁴ Mr. Hernandez’s brother is not named Justin. RP 255.

RP 224-25, 264. As he said this, defendant pulled what Mr. Hernandez believed to be a gun from the waistband of his pants and held it to Mr. Hernandez' head. RP 225, 264, 268, 275. Mr. Hernandez believed that defendant was going to kill him. RP 250.

Defendant moved into the apartment and directed Mr. Hernandez to the cordless telephone in the kitchen. RP 225-26. Defendant instructed Mr. Hernandez to pick up the phone and hand it to him. RP 270.

Defendant dialed a number and made Mr. Hernandez speak⁵ to the woman who answered. RP 229. Defendant told Mr. Hernandez to ask the woman out and whispered several other things he wanted Mr. Hernandez to repeat while he held the phone to Mr. Hernandez's ear. RP 230, 271. Defendant held the phone to his own ear to hear the woman's responses. RP 230, 271. Eventually the woman ended the call. RP 231.

After the phone call, defendant moved around the apartment and examined the closets. RP 233, 274. Mr. Hernandez moved with him as defendant still had the gun pointed at him. RP 234. When defendant turned to open a closet, Mr. Hernandez took the opportunity to escape from the apartment. RP 234.

Mr. Hernandez ran outside and saw his brother sitting in his car with a friend. RP 239-40. At Mr. Hernandez's urging, his brother drove

⁵ Mr. Hernandez is not fluent in English and did not understand all of the words defendant was forcing him to repeat. RP 230.

away from the apartment complex. RP 239-40. Mr. Hernandez saw defendant in a dark green Mitsubishi, following him. RP 241. Mr. Hernandez borrowed his friend's cell phone and called the police. RP 244.

The 9-1-1 operator had Mr. Hernandez pull into a gas station parking lot, where he was met by several patrol officers. RP 246. The officers eventually escorted Mr. Hernandez back to his apartment. RP 247, 295.

When Mr. Hernandez returned to his apartment, he found that his cordless phone was missing. RP 250. He provided officers with a license plate number of the Mitsubishi and identified defendant's Department of Licensing photograph. RP 357, 360-61.

Morgan Bell, another resident of the apartment complex, was loading his car when he saw Mr. Hernandez run out of his apartment and jump down the steps. RP 188-89. Mr. Hernandez ran off without saying anything to him. *See* RP 189. A few seconds later, he saw another man walk down the stairs with a cordless telephone in his hand. RP 190-91, 198. The second man asked him where Mr. Hernandez had gone. RP 191. Mr. Bell pointed in the direction Mr. Hernandez had run. RP 192. Moments later, as Mr. Bell was backing out of his parking space, he was nearly hit by a dark green Mitsubishi that was rushing out of the parking lot. RP 185.

Rita McDonald is defendant's mother-in-law. RP 102. Later the same evening, defendant appeared at Ms. McDonald's residence. RP 102, 104. Ms. McDonald noted that defendant appeared drunk and angry. RP 109-10. Defendant was angry because he thought his wife was having an affair with a man named Justin. RP 115. Ms. McDonald told the police that defendant had told her that he had taken a gun to "Justin's" house and had pointed it at Justin's brother. RP 128. He said he wanted to scare Justin into staying away from his wife. RP 115. At trial, Ms. McDonald stated that she was not sure if defendant had told her about having a gun or if that idea had been "implanted" by the police. RP 136.

The police investigation resulted in officers being dispatched to Ms. McDonald's residence approximately three hours after the incident. RP 357, 456. Defendant's green Mitsubishi was parked in the front of the trailer and officers observed him walking toward the car. RP 337. Lakewood Police Officer Daniel Tenney drew his gun and ordered defendant to get down on the ground. RP 338. When defendant was slow to comply, Officer Tenney took defendant down and handcuffed him. RP 340-41.

Lakewood Police Investigator Jeff Martin arrived and read defendant his Miranda warnings. RP 368-69. Defendant waived his rights and denied any wrong-doing. RP 370-71. Later, defendant was taken to the Lakewood Police Department where he was reissued his Miranda

warnings. RP 371. Defendant again waived his rights and agreed to an interview. RP 373, 381.

Defendant initially claimed he had nothing to do with the incident. RP 384. Later, he admitted he had gone to Mr. Hernandez's apartment looking for Justin. RP 389. Defendant wanted to find Justin because he was "a jealous man." RP 389-90. Defendant also stated that Justin had broken into his apartment a few days earlier and that Justin was a sex offender. RP 389, 395. Defendant then said he spoke to Mr. Hernandez from his car. RP 398.

When Investigator Martin expressed some doubt as to his story, defendant responded, "I fucked 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 there - - he didn't live there and I didn't believe him." RP 401. While defendant did not admit to using a gun, he did say that he made Mr. Hernandez believe that he had one. RP 402. Defendant claimed that he would not have had a gun because he was "a drug lord and smarter than that." RP 404. Defendant attempted to bargain with Investigator Martin by stating that he would tell the officer everything if he would agree to not take defendant to jail. RP 404. When Investigator Martin refused, defendant stated, "I'm sorry for what I did. I made a mistake. Take me to jail." RP 404-05. Investigator Martin took that statement to mean that defendant was terminating the interview. RP 405.

A search of Ms. McDonald's house and defendant's car did not reveal any evidence and officers never found a gun. RP 365-66.

Defendant did not testify at trial. His theory of the case was that he never threatened Mr. Hernandez with a gun, any reference to guns was a reference to his biceps, and he said a lot of things he did not mean to Investigator Martin because he was intoxicated. *See* RP 601, 611.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE TO A RATIONAL FACT FINDER THAT DEFENDANT COMMITTED KIDNAPPING AS A SEPARATE CRIME FROM ROBBERY AND THAT DEFENDANT WAS ARMED WITH A DEADLY WEAPON WHEN HE COMMITTED ASSAULT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d

632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. The State presented sufficient evidence to prove that defendant's act of kidnapping Mr. Hernandez was a separate and distinct act from the robbery.⁶

Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Saunders*, 120 Wn. App. 800, 817-18, 86 P.3d 232 (2004); *see also State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987) (where such conduct involved in the perpetration of a crime does not have an independent purpose or effect, it should be punished as an incident of the crime and not additionally as a separate crime). Although rooted in merger doctrine, courts reviewing kidnapping charges that are arguably merely incidental to another crime frequently borrow a sufficiency of the evidence analysis. *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760 (2010). Thus, whether the kidnapping is incidental to the commission of

⁶ Defendant also alleges that the kidnapping was incidental to the assault, but the State does not address this issue as the court found that the crimes merged at sentencing. *See* CP 65-78. The assault conviction remained on defendant's judgment and sentence because it did not merge with the burglary conviction under RCW 9A.52.050. Under RCW 9A.52.050, "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately." The assault did not count against either the kidnapping or robbery convictions for purposes of defendant's offender score. *See* CP 65-78

other crimes is a fact-specific determination. *Elmore*, 154 Wn. App. at 901; *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). In turn, the nature of the restraint determines whether the kidnapping will merge into a separate crime to avoid double jeopardy violations. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995).

Here, the record contains sufficient evidence to support a kidnapping conviction because the restraint was not incidental to the robbery. To find defendant guilty of kidnapping in the first degree, the State was required to prove that defendant:

- 1) . . . intentionally abducted another person; [and]
- 2) That the defendant abducted that person with intent to facilitate the commission of assault in the second degree or flight thereafter[.]

CP 13-55 (Jury Instruction 8); RCW 9A.40.020. Abduct means to restrain a person by using or threatening to use deadly force. CP 13-55 (Jury Instruction 20); RCW 9A.40.010(2). Restrain means to restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. CP 13-55 (Jury Instruction 21); RCW 9A.40.010(1).

To convict defendant of first degree robbery, the State was required to prove:

- 1) . . . defendant unlawfully took personal property, no 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; [and]
- 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[.]

CP 13-55 (Jury Instruction 12); RCW 9A.56.190, 9A.56.200.

Defendant committed robbery when he took the phone from Mr. Hernandez at gunpoint. At that point, the robbery was completed. If defendant had left immediately upon taking the phone, there would have been insufficient evidence to support the independent crime of kidnapping. However, defendant committed kidnapping when he used the gun to force Mr. Hernandez to move about his apartment while defendant looked for Justin. Defendant restricted Mr. Hernandez's movements without his consent by threatening to use deadly force. The moving about the apartment did nothing to further the robbery as defendant was not taking any items of personal property from Mr. Hernandez.

As the continued restraint of Mr. Hernandez did not facilitate or further the taking of property, the kidnapping was not merely incidental to the robbery. Taken in the light most favorable to the State, there was sufficient evidence to prove to a rational fact finder that defendant was guilty of kidnapping as an independent crime.

- b. The jury's verdict of guilt for assault in the second degree should be upheld where the State presented sufficient evidence to prove that defendant was armed with a deadly weapon.

To convict defendant of assault in the second degree, the State was required to prove that defendant assaulted Mr. Hernandez with a deadly weapon. CP 13-55 (Jury Instruction 14); RCW 9A.36.021(1)(c).

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 13-55 (Jury Instruction 25). A deadly weapon is 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 13-55 (Jury Instruction 19); RCW 9A.04.110(6).

Here, the State presented sufficient evidence to prove that defendant assaulted Mr. Hernandez with a deadly weapon. Mr. Hernandez testified that defendant held a gun to his head. While he could not remember what the gun looked like, he knew it was not defendant's

fingers in the shape of a gun. RP 250-51. Despite the fact that the officers did not find a gun, the jury clearly found Mr. Hernandez credible.

Defendant claims that the State did not prove that the gun was a deadly weapon because the jury instruction required an additional finding that the gun was used in such a way as to be readily capable of causing death or substantial bodily injury. *See* Appellant's Brief at 17-24. If defendant had merely displayed a firearm, defendant's argument may have had merit. However, defendant held his gun to Mr. Hernandez's head. Holding a gun to a person's head is a use which is readily capable of causing death or substantial bodily injury.

2. A UNANIMITY INSTRUCTION WAS NOT
REQUIRED BECAUSE THERE WAS
SUFFICIENT EVIDENCE TO SUPPORT EACH
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FIRST DEGREE ROBBERY AND FIRST
DEGREE BURGLARY.

A unanimity instruction is not required as to the means by which the crime was committed so long as substantial evidence supports each alternative means. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Thus, when there are alternative means of committing a crime and the jury is instructed on each means, either substantial evidence must support each alternative means on which evidence or argument was presented, or evidence and argument must have only been presented on one means. *State v. Lobe*, 140 Wn. App. 897, 905, 167 P.3d 627 (2007).

As noted above, to convict defendant of robbery in the first degree, it was required to prove that during the course of the robbery, defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon. CP 13-55 (Jury Instruction 12). Mr. Hernandez testified that defendant took the phone from him at gunpoint. RP 269. Also, the gun met the definition of a deadly weapon. Hence, defendant was both armed with a deadly weapon and displayed when he removed it from his waistband and held it to Mr. Hernandez's head. Substantial evidence supports both alternative means of committing robbery in the first degree.

To convict defendant of burglary in the first degree, the State had to prove that defendant entered or remained unlawfully in a building with the intent to commit a crime, and that in so entering or while in the building, defendant was armed with a deadly weapon or assaulted a person. CP 13-55 (Jury Instruction 10). Again, the State presented substantial evidence that defendant was armed with a deadly weapon. The State also presented sufficient evidence that defendant assaulted Mr. Hernandez when he touched Mr. Hernandez's head with the gun and caused Mr. Hernandez to be reasonably apprehensive of imminent bodily injury. RP 250-51, 275.

3. THE COURT'S INSTRUCTION RELATING TO ROBBERY IN THE FIRST DEGREE IMPROPERLY INCLUDED AN UNCHARGED ALTERNATIVE MEANS⁷ OF COMMITTING THE OFFENSE.

Under article I, section 22 of the Washington Constitution, a criminal defendant must be informed of all crimes he must face at trial, and cannot be tried for an uncharged offense. *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). The court may not, therefore, instruct the jury on an uncharged alternative means of committing a crime. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). To so instruct the jury is presumed prejudicial error unless it affirmatively appears that the error was harmless. *Bray*, 52 Wn. App. at 34-35. Jury instructions in this context are reviewed de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). This issue may be considered for the first time on appeal because it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000).

An error instructing on uncharged alternative means to commit a crime is harmless error only if other instructions clearly and specifically define the uncharged alternative. *State v. Chino*, 117 Wn. App. 531, 540-41, 72 P.3d 256 (2003). There must be affirmative evidence that there is

⁷ Because the State concedes that it was error to instruct the jury on uncharged alternative means of committing first degree robbery, the State does not address defendant's challenge to the information for not including the alternative means contained in the instructions. See Appellant's Brief at 41-45.

no possibility that the defendant was impermissibly convicted on an uncharged alternative. *State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989).

There are three ways for a person to commit first degree robbery. During the robbery, he must be 1) armed with a deadly weapon, or 2) display what appears to be a firearm or other deadly weapon, or 3) inflict bodily injury. RCW 9A.56.200.

Here, the State charged defendant with first degree robbery, alleging only the second alternative: that “defendant displayed what appeared to be a firearm or other deadly weapon, to-wit: a handgun.” CP 6-9. The court’s instruction to the jury included both the first and second alternatives: that “defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon.” CP 13-55 (Jury Instruction 12). Instructing the jury on the uncharged alternative means was error unless there was no possibility that the jury convicted defendant of the crime based on the uncharged alternative.

The record is clear that defendant displayed what appeared to be a deadly weapon when he held what Mr. Hernandez believed to be a gun to Mr. Hernandez’s head. Yet the State’s theory of the case was that the displayed firearm was real. *See* RP 128, 575. During closing, the State argued to the jury that defendant was, in fact, armed with a deadly weapon, but noted that the word “or” in the jury instruction allowed the jury to find defendant guilty if it believed defendant’s story that he only

“implied a gun with his hand,” as that was sufficient for the display alternative. RP 575. The jury instruction that contained the definition of robbery in the first degree also included the uncharged alternative means of committing this crime.

Based on the record, the State cannot say that the jury did not convict defendant because it believed he was armed with a handgun as opposed to only displaying what appeared to be a handgun. Because the error is not harmless, the State concedes that defendant’s conviction for robbery in the first degree should be vacated and remanded for a new trial for the robbery count only. The error does not affect any of defendant’s other convictions but defendant is entitled to be resentenced on those matters with a corrected offender score.

4. THE TRIAL COURT’S FAILURE TO INSTRUCT THE JURY ON THE DEFINITION OF TRUE THREAT WAS HARMLESS BEYOND A REASONABLE DOUBT.

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that “Congress shall make no law ... abridging the freedom of speech.” *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)). While the scope of the First Amendment is broad, it does not extend to “unprotected speech.” *State v. Kilburn*, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004).

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 intent to inflict bodily harm on or to take the life of another person. *Kilburn*, 151 Wn.2d at 43. A true threat is a serious threat, not one said in jest, idle talk, or political argument. *Kilburn*, 151 Wn.2d at 43. A jury instruction defining true threat must be given for the crime of felony harassment to ensure the jury finds the necessary mens rea to achieve the result of the hearer’s fear. *Schaler*, 169 Wn.2d at 287-88. Failure to instruct the jury on the definition of “true threat” is a manifest error affecting a constitutional right and may be raised for the first time on appeal. *Schaler*, 169 Wn.2d at 287-88.

Yet even manifest constitutional errors may be harmless. *Schaler* 169 Wn.2d at 282 (citing *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Manifest constitutional error is harmless if the court concludes “beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

Failure to instruct the jury of the definition of “true threat” is analogous to situations where the instructions omit an element of the crime. *Schaler*, 169 Wn.2d at 288. An omission of an essential element from the jury instructions may be harmless when it is clear that the

omission did not contribute to the verdict, such as when the omitted element is supported by uncontroverted evidence. *Schaler*, 169 Wn.2d at 288; *State v. Brown*, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002).

In *Schaler*, the defendant was convicted of felony harassment when he described a dream of killing his neighbors to a mental health specialist after calling a crisis services hotline. 169 Wn.2d 284. The defendant challenged the trial court's failure to instruct the jury on the definition of "true threat" because, under the facts of the case, his words were a "cry for help," and a reasonable person in his position would not foresee that a listener would take them as a serious expression of intent to kill his neighbors. *Schaler* 169 Wn.2d at 284. On appeal, the Supreme Court found that the First Amendment requires mens rea of simple negligence for a reasonable person to foresee that the threat to kill would be interpreted as a serious intention to take the life of another person. *Schaler*, 169 Wn.2d at 287. Without the necessary mens rea, a jury could convict a defendant based on something less than a "true threat." *Schaler*, 169 Wn.2d at 287. The Court then determined that such error was not harmless because the defendant's statements to the mental health professional took place in a hospital where he was receiving medical treatment for a mental breakdown. *Schaler* 169 Wn.2d at 289. Schaler's statements could have been a true threat or they could have a cry for help from a mentally troubled man. *Schaler*, 169 Wn.2d 289.

Here, the jury did not receive an instruction defining “true threat” for defendant’s crime of felony harassment. *See* CP 13-55. However, the omission was harmless because, unlike the facts of *Schaler*, the uncontroverted evidence is clear that defendant intended to threaten Mr. Hernandez with death and any reasonable person would have foreseen that his statement was a serious intention to take the life of another.

Defendant informed Mr. Hernandez that he wanted to kill someone and if he could not find Justin, he would kill Mr. Hernandez. RP 224, 264. Defendant then pulled what Mr. Hernandez believed to be a gun from his waistband and put it to Mr. Hernandez’s head. RP 224-25, 268-69. Defendant also pulled out a large amount of cash from his pocket and told Mr. Hernandez that it was the cash he would use to bail himself out of jail if he killed Mr. Hernandez. RP 269. Defendant kept the gun pointed at Mr. Hernandez the entire time they were together in the apartment. RP 225, 232-34, 269-70.

Defendant’s behavior after the event shows that he intended to place Mr. Hernandez in fear that the threat would be carried out. Defendant told Ms. McDonald that he was angry because he was suspicious that his wife and Justin were having an affair and had gone to Justin’s house to scare Justin away from his wife. RP 110, 115. Defendant said he had gone to Justin’s house with a gun and pointed the gun at Justin’s brother. RP 125, 128. Defendant told Inspector Martin that he did not believe Mr. Hernandez when he said that Justin was not at

the apartment and, while he denied having a gun, he ensured that Mr. Hernandez believed he had a gun. RP 401-02. Unlike the facts in *Schaler*, there can be no doubt that defendant intended to threaten to kill Mr. Hernandez and that he intended for Mr. Hernandez interpret his threat as a serious expression of his intent to kill.

Despite defendant's contention on appeal that he was merely engaging in "drunk talk," he did not threaten by just words, but took affirmative action to make Mr. Hernandez believe he was going to die by defendant's hand. The record here supports a conclusion that a reasonable person would foresee that defendant's threat to kill Mr. Hernandez would be interpreted as a serious expression of intention to take his life. The record does not support any other conclusion.

5. THE INFORMATION IS NOT DEFICIENT AS THE TERM "TRUE THREAT" IS A DEFINITION OF THREAT AND NOT AN INDEPENDENT ELEMENT OF THE CRIME OF FELONY HARASSMENT.

A charging document must allege facts that support every element of the crime and must adequately identify the crime charged so that the accused can prepare an adequate defense. *State v. Williams*, 162 Wn.2d 177, 183, 170 P.3d 30 (2007). The standard of review for evaluating the sufficiency of a charging document is determined by the time at which the motion challenging its sufficiency is made. *State v. Borrero*, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). When a defendant challenges the

information for the first time on appeal, courts liberally construe the document in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). The test for sufficiency of the charging document when the issue is first raised on appeal is “(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?” *Kjorsvik*, 117 Wn.2d at 105-06.

A person is guilty of harassment if, without lawful authority, he knowingly threatens to cause bodily injury immediately or in the future to the person threatened; and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(a)(i), (b). A person who harasses another is guilty of a class C felony if the person harasses another person by threatening to kill the person threatened. RCW 9A.46.020(b)(ii). In order to convict an individual of felony harassment based upon a threat to kill, the State must prove that the defendant knowingly threatened to kill and the person threatened was placed in reasonable fear that the threat to kill would be carried out. RCW 9A.46.020; *State v. C.G.*, 150 Wn.2d 604, 612, 80 P.3d 594 (2003).

To satisfy the First Amendment, Washington courts have held that the threat must be a “true threat.” *Schaler*, 169 Wn.2d at 283; *State v. Tellez*, 141 Wn. App. 479, 482, 170 P.3d 75 (2007). Yet “no Washington

court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or ‘to convict’ instruction.” *State v. Tellez*, 141 Wn. App. at 483.

In *Schaler*, while the court stated that the failure to include a definition of true threat in the jury instruction was analogous to a jury instruction which omitted an element of the crime, the court specifically noted that the situations was not identical to omitted-element cases. 69 Wn.2d at 288-89, n. 6. The Court specifically declined to address whether the “true threat” showing of mens rea was an element of the crime of felony harassment. *Schaler*, 169 Wn.2d at 289 n. 6. The Court’s holding was thus limited to requiring a definition of “true threat” in the jury instructions and never addressed the requirements of “to convict” instructions or adequacy of the information. See *Schaler*, 169 Wn.2d at 288-90.

In construing the analogous felony telephone harassment statute, RCW 9.61.230(2)(b), Division I of the Court of Appeals determined that “the constitutional concept of ‘true threat’ merely defines and limits the scope of the essential threat element in the felony telephone harassment statute and is not itself an essential element of the crime.” *State v. Tellez*, 141 Wn. App. 479, 483-84, 170 P.3d 75 (2007). Consequently, the “true threat” requirement need not be included in the charging document or the “to convict” instruction, provided that the

definition of “true threat” was contained within the jury instructions.

Tellez, 141 Wn. App. at 483-84.

The holding in *Tellez* is consistent with established case law given the differing purposes of an information and jury instructions:

The purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case. On the other hand, the purpose of an information is to give a defendant notice of the crime with which he or she is charged. Because of these different purposes, jury instructions must necessarily contain more complete and precise statements of the law than are required in an information.

Borrero, 147 Wn.2d 353, 362, 58 P.3d 245 (2002) (citing the lower court’s decision, *State v. Borrero*, 97 Wn. App. 101, 107, 982 P.2d 1187 (1999)). In *Borrero*, the defendant challenged the information alleging attempted murder because it did not define “attempt” as taking a “substantial step” toward the completed crime. 147 Wn.2d at 363. Under a strict standard of review, the Court held that the inclusion of the word “attempt” was sufficient to put the defendant on notice that he could defend himself by showing that he did not make an effort to commit murder. *Borrero*, 147 Wn.2d at 363.

This court should adopt the reasoning in *Tellez* and find that the term “true threat” limits the scope of the threat element. The First Amendment requirement that a threat be a true threat is consistent with reading true threat as a limiting definition of threat. It is not consistent with requiring true threat to be an additional element of harassment, in

addition to threat. Hence, defendant's argument should fail as there is no requirement that "true threat" be included in the charging document.

If this court declines to adopt *Tellez*, defendant's argument still fails because the necessary facts appear in the charging document and he has not shown actual prejudice.

Defendant has challenged the adequacy of the information for the first time on appeal, requiring a liberal reading of the document. The information alleged that defendant

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[.]

CP 6-9. This definition established all of the essential elements of the crime of felony harassment. The requirement that defendant's statements be unlawful put him on sufficient notice that his speech was not protected under the First Amendment. The information clearly states that defendant could defend himself by showing that 1) his statements were protected under the First Amendment, 2) he did not knowingly threaten Mr. Hernandez, 3) he did not place Mr. Hernandez in fear, or 4) that Mr. Hernandez's fear was not reasonable. As defendant received adequate notice to defend himself from the charges against him, the information was not deficient.

In addition, defendant fails to show that he was actually prejudiced by the language of the charging document. Defendant's theory at trial was that the event never happened: there was no gun, Mr. Hernandez had to "stick with this idiotic story" that he made up, and that his statements to the officers afterwards were all "drunk talk." RP 615, 618, 619. Clearly, defendant was not prejudiced by the fact that the information did not limit the threat to a "true threat" when his defense was that he did not threaten Mr. Hernandez directly and his statements to the officers were not serious.

6. DEFENDANT RECEIVED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL AS DEFENDANT
CANNOT SHOW DEFICIENT PERFORMANCE
OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, section 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.

Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Jeffries, 105 Wn.2d at 418; *see also State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State*

v. *Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Lord, 117 Wn.2d at 883 (*citing Strickland*, 466 U.S. at 689-90).

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690;

State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689.

A review of the entire record indicates that counsel was an advocate for his client. Despite overwhelming evidence of guilt, counsel made motions in limine, made objections during trial, challenged the memory and credibility of the State’s witnesses and successfully moved for a dismissal of unproven crimes at the close of the State’s case-in-chief. Further, counsel was able to argue against the State’s arguments in his closing and was able to address the issues he thought important in light of the context of this particular trial.

Defendant claims that counsel was ineffective for failing to request a limiting instruction for testimony he alleges was introduced for impeachment purposes. *See* Appellant’s brief at 25. During trial, counsel questioned the information Investigator Martin included in his request for a warrant to search defendant’s car. RP 452. Specifically, counsel elicited information that Mr. Hernandez told officers that defendant was armed with a black-colored semiautomatic handgun. RP 452. At closing, counsel argued that Mr. Hernandez’s inability to describe the gun meant

that there was no gun. *See* RP 618. The implication of counsel's question and later argument was that Officer Figueroa inserted a description of the gun on his own initiative. *See* RP 452, 618. This tied in with counsel's suggestion that officers planted the idea of a gun in Ms. McDonald's mind and that Investigator Martin was committing perjury when he testified that he did not record the interview with defendant. *See* RP 610-11, 620. Simply put, counsel was using the statement for more than mere impeachment.⁸

Defendant also claims that counsel was ineffective for failing to object to the introduction of Ms. McDonald's statements to the police on the basis of hearsay. *See* Appellant's brief at 27. The State used the transcript of Ms. McDonald's interview with the police to refresh her memory. *See* RP 121-23; ER 612. After reviewing the transcript, Ms. McDonald testified that defendant must have told her he had taken a gun to Justin's house. RP 125. She then attempted to back away from her statement by claiming that the officers told her about the gun, not defendant. *See* RP 125-26. Defendant's statements to Ms. McDonald are not hearsay. *See* ER 801(d)(2). Counsel's performance was not deficient when he did not object to the testimony.

⁸ Contrary to defendant's argument, the State never used this evidence to impeach Investigator Martin, but argued that defendant's suggestion that much of the evidence in the case was manufactured by law enforcement was less likely than Mr. Hernandez merely forgetting what the pistol looked like, 22 months later. *See* RP 637-38.

Finally, defendant cannot show prejudice. The jury found Mr. Hernandez credible. Mr. Hernandez testified that defendant held a gun to his head. Defendant told Investigator Martin that he made Mr. Hernandez believe he held a gun to his head. Even if counsel's performance was deficient, it had no effect on the jury's findings of guilt.

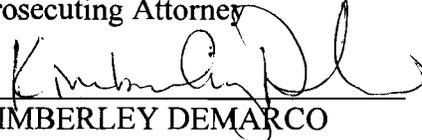
Defendant has not overcome the presumption of competency because he cannot prove that counsel's performance was deficient or that he was prejudiced by it.

D. CONCLUSION.

The State respectfully requests this court to vacate defendant's conviction for first degree robbery only, and remand for a new trial on that count and resentencing with a corrected offender score on the remaining counts.

DATED: March 28, 2011.

MARK LINDQUIST
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Prosecuting Attorney


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WSB # 39218

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/21/11 [Signature]
Date Signature

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