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Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRANDON MICHAEL ENGLISH, Appellant.	No. 46921-9-II Consolidated with:
STATE OF WASHINGTON, Respondent, v. CALVIN JAMES QUICHOCHO, Appellant.	No. 47001-2-II UNPUBLISHED OPINION

LEE, J. — Brandon Michael English and Calvin James Quichocho were convicted of two counts of first degree robbery, two counts of first degree kidnapping, and two counts of second degree assault, all while armed with a firearm. They appeal, arguing: (1) the trial court erred by omitting an essential element from the jury instruction for robbery, (2) their convictions for first degree robbery should have merged with second degree assault, (3) their right to a public trial was violated when the parties exercised peremptory challenges in writing, (4) the State committed prosecutorial misconduct when the prosecutor elicited testimony that a witness received a plea bargain in exchange for his truthful testimony, (5) the State failed to present sufficient evidence of

the firearm enhancements because it failed to prove that the firearm was operable, and (6) they received ineffective assistance of counsel when (a) counsel failed to object to the alleged prosecutorial misconduct, and (b) counsel agreed to the State playing a redacted recording of Quichocho's police interview. Quichocho raises additional claims in a Statement of Additional Grounds (SAG). We affirm.

FACTS

A. THE CRIME

Colby Haugen lived alone in an apartment in Vancouver, Washington, and sold marijuana from his apartment. On December 3, 2013, Austin Bondy was with Haugen at his apartment. John Lujan, Juan Alfaro, and Brandon English went to Haugen's apartment to smoke marijuana and to gather information about Haugen's apartment as a part of their plan to rob Haugen the next day.

On December 4, Lujan, English, and Calvin Quichocho met to carry out the robbery. Bondy and Brittany Horn were waiting in Haugen's apartment while Haugen was at work. When there was a knock at the door, Bondy opened it to find Lujan, English, and Quichocho. After asking to purchase marijuana, Quichocho drew a revolver and ordered Bondy to give them money. Quichocho ordered Lujan to tie up Bondy and Horn, and Lujan complied by wrapping a cord around their wrists. Bondy and Horn were then put into the bedroom closet and ordered to stay there or they would be killed. Lujan, English, and Quichocho took Haugen's marijuana, Xbox gaming system, iPod, video games, and change jar; Bondy's wallet; and Horn's purse and phone.

Afterwards, Alfaro asked Lujan whether they completed the robbery and what they obtained. Lujan responded that they had taken an Xbox 360 and $20 worth of marijuana.

During the police investigation, Lujan identified English and Quichocho as being involved in the robbery. Bondy and Horn identified Quichocho from a photo montage. Horn also identified English from a photo montage. Lujan reported that Quichocho was driving a dark gray Chevrolet Impala with a Guam sticker on the rear window. Police later located an Impala with a Guam sticker at Quichocho's residence.

The State charged English and Quichocho with two counts of first degree robbery,[1] two counts of first degree kidnapping,[2] and two counts of second degree assault,[3] alleging that they "and/or an accomplice"[4] were armed with a firearm during the commission of all six crimes.[5] Clerk's Papers (CP) (English) at 14-15.

B. VOIR DIRE

During voir dire, juror 7 reported: "[M]y home was robbed while we were in it in the middle of the night," but that there was no contact with whomever broke in. 2 Verbatim Report of Proceedings (VRP) at 196-97. Juror 8 reported that her ex-husband kidnapped her at gunpoint in 1979, and that the experience "could affect [her]." 2 VRP at 199. The State asked, "Now, are you saying that you don't think you could be impartial or you're just not sure?" and juror 8 responded: "I'm just not sure." 2 VRP at 199-200. English and Quichocho did not challenge these jurors.

[1] RCW 9A.56.200.

[2] RCW 9A.40.020.

[3] RCW 9A.36.021.

[4] RCW 9A.08.020.

[5] RCW 9.94A.825, or as an accomplice under RCW 9.94A.533(3).

The parties exercised four peremptory challenges on the record outside the presence of the jury panel. After the jury panel returned to the courtroom, the parties exercised further peremptory challenges in writing at the sidebar. English and Quichocho were not present at the sidebar, but were in the courtroom when the peremptory challenges were exercised.

C. TRIAL TESTIMONY

Haugen, Bondy, Horn, Alfaro, and Lujan testified. Neither English nor Quichocho testified. The photo montages signed by Horn, Bondy, and Lujan were admitted into evidence. Lujan testified against English and Quichocho as part of a plea deal. The State questioned Lujan on direct examination about his obligation under the plea agreement to tell the truth.

Detective Tim Martin testified that before the investigation in this case, Quichocho admitted to using or having used the nickname "Huss" or "Lil Hustler." 7 VRP at 810. Detective Martin also testified that he has not met anyone else in the community who uses that same nickname.

The State moved to introduce English's cell phone records through Detective Jason Granneman's testimony. Quichocho objected, arguing that the State presented insufficient evidence tying Quichocho to the phone and the "Lil Huss" contact entry on the phone. 9 VRP at 1110-112. The trial court overruled Quichocho's objections, finding that Quichocho's arguments go to the weight of the evidence, not the admissibility, and that the references to "Lil Huss" were "simply a part of the evidence." 8 VRP at 994. The trial court further noted that the phone records were "substantially reduced to certain entries that counsel have had a chance to examine." 9 VRP at 1118. Detective Granneman testified that English's cell phone records revealed multiple

outgoing calls to a number identified as "Lil Huss." 10 VRP at 1157, 1162. Detective Granneman also testified that records from a cell phone found on Quichocho's person, which was later determined to belong to his girlfriend, revealed an outgoing text message to English's cell phone on December 3. The phone had also received e-mails addressed to "Huss." 11 VRP at 1326-27.

Bondy testified that Quichocho pulled out a gun with a "revolving chamber." 4 VRP at 444. Bondy acknowledged that he was "[n]ot very" familiar with guns, but that he knew a revolver was used. 4 VRP at 444. Bondy also testified that Quichocho told Bondy that "that bullet was for [him]" and that he was scared. 4 VRP at 445.

Horn testified that the "shorter guy" pointed a gun at her, and she thought to herself, "I'm going to die." 5 VRP at 560. Horn identified the "shorter person" as Quichocho. 5 VRP at 574-75. Horn also testified that she was not very familiar with guns, but this gun had a "round cylinder" where the bullets are loaded. 5 VRP at 562. Horn further testified that she and Bondy were directed to stay in the bedroom closet or they would be killed.

Lujan testified that Quichocho drew a gun on Bondy, and then pointed the gun at him and directed him to tie up Bondy and Horn. Lujan also testified that Quichocho ordered him to lay down on the floor, and he thought, "I'm dead." 7 VRP at 845.

The State moved to introduce a redacted recording of Quichocho's police interview, along with a transcript, during Detective Jared Steven's testimony. Quichocho's counsel agreed to have the redacted recording played.

The trial court instructed the jury that in order to convict English and Quichocho of first degree robbery, the State must prove the following six elements beyond a reasonable doubt:

> (1) That on or about December 4, 2013, the defendant or an accomplice unlawfully took personal property from the person or in the presence of [Bondy and Horn];
>
> (2) That the defendant or an accomplice intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property;
>
> (4) That force or fear was used by the defendant or an accomplice 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 the immediate flight therefrom the defendant or an accomplice 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 (English) at 116.

D. VERDICT AND SENTENCING

The jury convicted English and Quichocho as charged. At sentencing, the trial court found: "Counts 5 and 6, the assault charges, would merge with the—I want to use the correct word whether we use merger or constitute same criminal conduct. In any event, we will not impose sentence as to those two, so we are proceeding as to two counts of robbery in the first degree and two counts of kidnapping in the first degree." 13 VRP at 1651. The felony judgment and sentence

show that English and Quichocho were sentenced for all six counts charged.[6] English and Quichocho appeal.

ANALYSIS

A. ROBBERY

English and Quichocho argue that the to-convict instruction for robbery omitted the essential element that the victim must have an interest in the property taken and allowed the jury to convict on improper grounds. We agree.

"The essential elements of the crime are those that the prosecution must prove to sustain a conviction." *State v. Richie*, 191 Wn. App. 916, 921, 365 P.3d 770 (2015); *State v. Peterson*, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). We first look to the statute to determine the essential elements. *Richie*, 191 Wn. App. at 921.

RCW 9A.56.190 defines robbery:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

Additionally, robbery includes an essential, implied element that the victim has "an ownership, representative, or possessory interest in the property taken." *Richie*, 191 Wn. App. at 924; *accord State v. Tvedt*, 153 Wn.2d 705, 714, 107 P.3d 728 (2005) ("[I]n order for a robbery to occur, the

[6] The judgment and sentence noted that counts 5 and 6 did not affect English and Quichocho's offender score because they encompassed the same criminal conduct.

person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property.").

1. The To-Convict Jury Instruction for Robbery

"We review alleged errors of law in jury instructions de novo."[7] *Richie*, 191 Wn. App. at 927 (quoting *State v. Fehr*, 185 Wn. App. 505, 514, 341 P.3d 363 (2015)). "A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime." *Id.* "A to-convict instruction must contain all essential elements of a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence." *Id.*; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Richie resolved the precise argument raised here. In *Richie*, the trial court's to-convict instruction for robbery mirrored the language of 11 *Washington Practice: Pattern Jury Instruction Criminal*: 37.02, at 667 (3d ed. 2008) (WPIC), and omitted the element of whether the victim had an ownership, representative, or possessory interest in the property taken. 191 Wn. App. at 928. *Richie* held that the to-convict instruction was erroneous because it omitted an essential implied element—the element of whether the victim had an ownership, representative, or possessory interest in the property taken—and, therefore, relieved the State of its burden to prove every element of the crime. *Id.* The court noted that "the fact that the trial court's instruction was patterned after a Washington pattern instruction does not change our conclusion." *Id.* at 929.

[7] English and Quichocho did not object to the instruction and raise the issue for the first time on appeal. Generally, we are not required to consider issues that were not objected to below. RAP 2.5. However, we review the omission of an essential element in jury instructions for the first time on appeal because it is a manifest error affecting a constitutional right. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); *Richie*, 191 Wn. App. at 927.

Here, the trial court's to-convict instructions for robbery also tracked the language of WPIC 37.02 and similarly omitted the essential implied element for first degree robbery of whether the victim had an ownership, representative, or possessory interest in the property taken. Therefore, we hold that *Richie* controls, and the trial court's to-convict instructions for robbery were erroneous because they omitted an essential element of the crime, relieving the State of its burden to prove every element of the crime.

2. Harmless Error

"Under certain circumstances, the omission of an essential element of a crime from the to-convict jury instructions may be subject to a harmless error analysis." *Id.*; *see State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010). An omission of an essential element of a crime is harmless when, for example, uncontroverted evidence supports the omitted element. *Richie*, 191 Wn. App. at 929. "However, 'error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.'" *Id.* (quoting *Schaler*, 169 Wn.2d at 288).

Here, while the to-convict instruction for robbery omitted the essential element that the victim have an ownership, representative, or possessory interest in the stolen property, the evidence was not ambiguous on this issue. The State presented evidence that Bondy and Horn had property stolen from them. Specifically, the State presented testimony that Bondy's wallet and Horn's purse and phone were stolen during the robbery. It is uncontroverted that Bondy and Horn had an ownership, representative, or possessory interest in their personal property and that their personal property was stolen. As a result, the evidence does not lead to any ambiguity for the jury

as to whether Bondy and Horn had an ownership, representative, or possessory interest in the stolen property. Because the uncontroverted evidence supported the omitted element, the instructional error was harmless.

We hold that the to-convict instructions for robbery improperly omitted an essential element of the crime of burglary—that the victim have an ownership, representative, or possessory interest in the stolen property. But, we also hold that this error was harmless.

3. Merger

English and Quichocho argue, and the State concedes, that the two convictions of first degree robbery merged with the two counts of second degree assault, and the assault convictions should have been vacated.[8] We agree.

When an assault offense elevates a robbery offense, the two offenses merge and are the considered the same offense for double jeopardy purposes. *State v. Kier*, 164 Wn.2d 798, 803-06, 194 P.3d 212 (2008); *State v. Freeman*, 153 Wn.2d 765, 777-78, 108 P.3d 753 (2005). In such situations, the conviction for the lesser offense should be vacated. *State v. Hughes*, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009).

Here, the second degree assault offenses merged with the first degree robbery offenses because the assault offenses elevated the robbery offenses to the first degree. As a result, the second degree assault convictions, as the lesser offenses, should have been vacated. Therefore, we accept the State's concession and hold that English and Quichocho's convictions for second degree assault should be vacated.

[8] The State argued below that the trial court should apply the same criminal conduct analysis.

B. RIGHT TO PUBLIC TRIAL AND TO BE PRESENT

English and Quichocho argue that the trial court improperly handled peremptory challenges, violating their rights to a public trial and to be present.[9] We disagree.

The parties exercised four peremptory challenges on the record "in open court," before the jury panel reentered the courtroom. After the jury panel returned, the parties exercised further peremptory challenges in writing at sidebar. English and Quichocho were not present at sidebar, but they were in the courtroom. English and Quichocho note that "written notes" were filed in the trial court, and the public could determine which jurors had been excluded by which party by requesting to view those notes in the trial court file. Br. of Appellant (English) at 15.

English and Quichocho contend that this process violated their right to a public trial, and their convictions must be reversed. They also argue that their right to be present was violated when they were not present at sidebar when counsel exercised peremptory challenges in writing.

To determine whether a defendant's public trial right has been violated, we must determine (1) whether the public trial right attaches to the proceeding at issue; (2) if the right attaches, whether the courtroom was closed; and (3) if the courtroom was closed, whether the closure was justified. *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015), *cert. denied*, 136 S. Ct. 1524 (2016). The public trial right attaches to jury selection, including for cause and peremptory challenges. *Id*. at 605-06. "[W]ritten peremptory challenges are consistent with the public trial

[9] English and Quichocho acknowledge that the Washington State Supreme Court rejected these arguments in *State v. Love*, 183 Wn.2d 598, 608, 354 P.3d 841 (2015), but raised the issue to preserve them in the event that the United States Supreme Court reviews *Love*. The U.S. Supreme Court denied certiorari on April 4, 2016. 136 S. Ct. 1524 (2016).

right so long as they are filed in the public record," made in open court, and subject to public scrutiny. *Id.* at 607.

Here, the public trial right attached to the jury selection process, but the courtroom was not closed. Although the parties exercised peremptory challenges in writing at sidebar, this was done in open court, where the public could evaluate each step of the jury selection process by listening to the questions and answers during voir dire and observing counsel exercise challenges on paper. And English and Quichocho acknowledge that the written challenges were filed in the public record. Therefore, their argument fails.

As for the right to be present, while defendants have the right to be present during jury selection under both the state and federal constitutions, the record does not indicate that English's or Quichocho's right to be present was violated. English and Quichocho acknowledge that they were present in the courtroom during jury selection and that the challenges were exercised in open court. Furthermore, neither English nor Quichocho demonstrate that they could not consult with their attorneys about the challenges or participate in the process. Accordingly, this argument also fails.

C. PROSECUTORIAL MISCONDUCT

English and Quichocho argue that the prosecutor committed misconduct when he elicited on direct examination that Lujan received a plea bargain offer in exchange for his truthful testimony against English. We hold that because the appellants did not object in the trial court and fail to establish prejudice here, their argument fails.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). First, we determine whether the prosecutor's conduct was improper. *Id.* at 759. If the prosecutor's conduct was improper, the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Id.* at 760. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id.* at 761.

1. Improper Vouching

A prosecutor commits misconduct by personally vouching for a witness's credibility or veracity. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *Id.*

In *Ish*, the trial court admitted evidence of a plea agreement between the State and Ish's cellmate, and allowed the State to question the cellmate about the agreement. *Id.* at 193-94, 196-97. Under the plea agreement, the cellmate "agree[d] to provide 'a complete and *truthful* statement,' to 'testify *truthfully*,' and to 'have told the *truth*, to the best of his knowledge.'" *Id.* at 193. On direct and redirect examination, the prosecutor's questions established that the plea agreement required "[t]ruthful testimony" and the prosecutor elicited testimony from the cellmate that he agreed to testify truthfully. *Id.* at 194.

The *Ish* court held that admitting the plea agreement and the prosecutor's subsequent questioning constituted vouching by the prosecutor.[10] *Id.* at 201. The court reasoned:

> Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving and irrelevant, and may amount to vouching, particularly if admitted during the State's case in chief. "[P]rosecutorial remarks implying that the government is motivating the witness to testify truthfully: . . 'are prosecutorial overkill.'" We agree with the court's conclusion in *Green* that evidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief. Evidence is not admissible merely because it is contained in an agreement, and reference to irrelevant or prejudicial matters should be excluded or redacted.

Id. at 198 (citations omitted).

Here, the State questioned Lujan on direct examination about his obligation under the agreement to tell the truth. Under *Ish*, this constitutes improper vouching by the prosecution.

The State argues that it was entitled to engage in preemptive questioning about Lujan's agreement to testify truthfully because the cross-examination shows that the State correctly anticipated an attack on Lujan's credibility. The State cites *State v. Smith*, 162 Wn. App. 833, 850, 262 P.3d 72 (2011), *review denied*, 173 Wn.2d 1007 (2012), in support of its preemptive questioning. However, the facts in *Smith* are clearly distinguishable and its holding is inapplicable to the situation here.

[10] *Ish* was a plurality opinion, but a majority of the justices agreed that the prosecutor improperly vouched for the witness's credibility. 170 Wn.2d at 201 (plurality opinion), 206 (Sanders, J., dissenting).

In *Smith*, one appellant argued that the State had engaged in prosecutorial misconduct by eliciting on its direct examination of a co-defendant that the co-defendant's plea agreement required truthful testimony. 162 Wn. App. at 848. However, this court disagreed because the appellant had "clearly announced at the trial's outset his intent to attack [his co-defendant's] credibility based on his plea bargain with the State." *Id.* Therefore, this court held, "the State was entitled to engage in anticipatory rehabilitation of this witness." *Id.*

Here, the State has not identified acts or statements by the defense that would allow an "anticipatory rehabilitation" of Lujan. To hold an "anticipatory rehabilitation" was justified in this case, without any identified acts or statements by the defense, would contradict the law established in *Ish*. Therefore, we hold that the State engaged in improper vouching of Lujan when it questioned Lujan on direct examination about his obligation to tell the truth under the plea agreement.

2. Prejudice

If a defendant does not object at trial, he or she is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making that determination, we "focus less on whether the

prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762.

Here, the appellants did not object at trial. On appeal, appellants argue that "the error . . . was not harmless" because the identifications by Bondy, Horn, and Haugen were "shaky" and were "undermined" by the defense witness who testified about the unreliability in eye-witness identifications. Br. of Appellant (English) at 27. But English and Quichocho fail to argue, and thus fail to show, how the prosecutor's improper vouching could not have been cured with an instruction.

The appellants also fail to show that any resulting prejudice "'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). Bondy and Horn identified English and Quichocho in court as the individuals involved in the robbery. Further, Detective Stevens testified that Lujan identified Quichocho during the investigation. Alfaro testified that he, Lujan, and English went to Haugen's apartment the night before to plan the robbery. Bondy testified that English was at Haugen's apartment the night before the robbery and during the robbery. Based on the other witnesses' identifications of both English and Quichocho as the individuals involved in the robbery and testimony about the events, there is not a substantial likelihood that the prosecutor's improper vouching of Lujan affected the jury verdict. Having failed to make the requisite showing of prejudice under *Emery*, 174 Wn.2d at 761, we hold that the appellants fail to show that the State's improper vouching requires reversal.

D. SUFFICIENCY OF THE EVIDENCE FOR FIREARM ENHANCEMENTS

English and Quichocho argue that the State presented insufficient evidence for each of the firearm enhancements because the State did not prove that the firearm was operable.[11] We disagree.

We review sufficiency of the evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably drawn therefrom. *Id.* We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

The premise of English's and Quichocho's argument is that the State is required to prove that the firearm was operable to meet the statutory definition of a firearm. English and Quichocho cite *State v. Recuenco*[12] and *State v. Pierce*, 155 Wn. App. 701, 230 P.3d 237 (2010), to support

[11] English and Quichocho's arguments relate solely to the lack of evidence that the firearm was operable. Neither makes other arguments related to the sufficiency of the evidence for the firearm enhancements.

[12] In *Recuenco*, the court noted:

> The dissent appears to argue that because the only deadly weapon discussed at trial was a handgun, it was appropriate to ask for the firearm enhancement at sentencing rather than the charged and convicted deadly weapon enhancement. The dissent overlooks here that in order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm:" "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." 11

their argument that in order to prove a firearm enhancement, the State must present sufficient evidence to find a firearm operable. We reject this argument.

The same argument raised by English and Quichocho was addressed and rejected by our court in *State v. Raleigh*, 157 Wn. App. 728, 734-36, 238 P.3d 1211 (2010) and by Division Three of this court in *State v. Tasker*, 193 Wn. App. 575, 581–82, 373 P.3d 310, *review denied*, 186 Wn.2d 1013 (2016). Both the court in *Raleigh* and the court in *Tasker* held that the language in *Recuenco* relied on by the appellant "was not part of *Recuenco*'s holding and is nonbinding dicta." *Raleigh*, 157 Wn. App. at 735; *Tasker*, 193 Wn. App. at 592. The *Tasker* court also rejected *Pierce*, holding that "we disagree with the suggestion in *Pierce* that the State must always present evidence specific to operability at the time of the crime. And five months after *Pierce*, another panel of Division Two reached a diametrically different result in *Raleigh*." *Tasker*, 193 Wn. App. at 593-94. Thus, both Division Three in *Tasker* and this court in *Raleigh* have "characterized *Recuenco*'s statement about the requirement of 'sufficient evidence to find a firearm operable' as nonbinding dicta, pointing out that it was 'merely to point out that differences exist between a deadly weapon sentencing enhancement and a firearm sentencing enhancement.'" *Id*. at 591 (quoting *Raleigh*, 157 Wn. App. at 735-36).

> WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (2d ed. Supp. 2005) (WPIC). We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement. *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

163 Wn.2d 428, 437, 180 P.3d 1276 (2008).

The relevant inquiry is whether the firearm was a gun in fact or a toy gun or gun-like object incapable of being fired. *State v. Faust*, 93 Wn. App. 373, 379-81, 967 P.2d 1284 (1998). Evidence that the firearm appears to be a real gun is sufficient. *Tasker*, 193 Wn. App. at 594; *Raleigh*, 157 Wn. App. at 735-36.

Here, three people testified that Quichocho was armed with a gun, that Quichocho threatened Bondy, Horn, and Lujan with the gun to effectuate the robbery, and that they believed they were going to die as a result. Bondy testified that the gun had a "revolving chamber," that Quichocho told him that "that bullet was for [him]," and that he was scared. 4 VRP at 444-45. Horn testified that the gun had a "round cylinder" where bullets are loaded and that when Quichocho pointed the gun at her she thought she was going to die. 5 VRP at 560. Lujan also testified that Quichocho drew a gun on Bondy, then pointed the gun at him and ordered him to lay down on the floor, at which point, he thought, "I'm dead." 7 VRP at 845. Collectively, the evidence was sufficient to establish that the gun used was a gun "in fact" and not a toy gun or gun-like object incapable of being fired. Thus, sufficient evidence supports the firearm enhancements.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

English and Quichocho argue that they received ineffective assistance of counsel when their counsel failed to object to the prosecutor's improper vouching, and by counsel's "apparent agreement and/or failure to object to the admissibility of inadmissible evidence of guilt that implicated [them] in the charged offenses and violated [their] right of confrontation." Br. of Appellant (Quichocho) at 12 (some capitalization omitted), 21 (adopted by English). Specifically, English and Quichocho argue that their respective counsel should have objected to the playing of

a redacted recording of Quichocho's police interview because the recording allowed police to offer inadmissible opinion testimony as to their veracity and guilt. Further, English and Quichocho argues that the recording violated Quichocho's right to confrontation. We disagree.

1. Legal Principles

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish ineffective assistance of counsel, English and Quichocho must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). To show prejudice, English and Quichocho must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335. If English and Quichocho fail to satisfy either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a strong presumption of effective assistance, and English and Quichocho bear the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "[C]ounsel's performance is not deficient if it can be characterized as a legitimate trial tactic." *State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014).

We view the decisions of whether and when to object as "classic example[s] of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). We presume that a failure to object is a part of a legitimate trial strategy. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). Where a defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must rebut this presumption by showing that the objection would likely have succeeded and the result of the proceeding would have been different. *Id.*; *State v. Gerdts*, 136 Wn. App. 720, 726-27, 150 P.3d 627 (2007). "The absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn. App. 517, 525-26, 237 P.3d 368 (2010), *review denied*, 171 Wn.2d 1021 (2011). Also, it is a legitimate trial tactic to forego an objection in circumstances where counsel wishes to avoid highlighting certain evidence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). '"Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal."' *Johnston*, 143 Wn. App. at 19 (quoting *Madison*, 53 Wn. App. at 763).

2. Failure to Object to the State's Improper Vouching of Lujan

English and Quichocho argue that they received ineffective assistance of counsel when their counsel did not object to the prosecutor's improper vouching during its direct examination of Lujan. We hold that English and Quichocho fail to establish that but for their counsels' failure to object, there is a reasonable probability that the result would have been different, and therefore, their argument fails.

Here, the State questioned Lujan on direct examination about his obligation under the plea agreement to tell the truth and the defense did not object. Under *Ish*, this constitutes vouching by the prosecution. Had defense counsel objected, the trial court likely would have instructed the jury to disregard Lujan's testimony in regards to testifying truthfully under the plea agreement. *See* Section C, subsection 1, *supra*.

However, English's and Quichocho's arguments fail because they do not show a reasonable probability that, but for counsels' deficient performance, the result of the proceeding would have been different. They argue that Lujan's testimony "was of critical importance to the State's argument that Quichocho was involved in the robbery." Br. of Appellant (Quichocho) at 22. But Quichocho was also identified by Bondy and Horn as the person who pulled the gun and demanded the money. And Quichocho was linked to the robbery through circumstantial evidence like the gray Impala with a Guam sticker and the cell phone records.

Also, Bondy and Horn identified English and Quichocho in court as persons involved in the robbery. Bondy also testified that English was at Haugen's apartment the night before the robbery and during the robbery. And Detective Stevens testified that Lujan identified Quichocho during the investigation. Further, Alfaro testified that he, Lujan, and English went to Haugen's apartment the night before to plan the robbery.

With the multitude of other evidence identifying English and Quichocho, the vouching was not prejudicial, and counsel may have foregone an objection in order to avoid highlighting the evidence. Therefore, we hold that English's and Quichocho's argument fails because they do not

establish a reasonable probability that, but for their counsels' failure to object to the State's vouching, the result of the proceeding would have been different.

3. Counsel's Agreement to Play Quichocho's Recorded Police Interview

Quichocho argues that he received ineffective assistance of counsel when defense counsel agreed to the playing of a redacted version of his recorded pre-trial police interview.[13] Specifically, he argues that counsel should not have agreed to the redacted version because it included Detective Granneman's inadmissible opinion testimony as to Quichocho's veracity and guilt and it violated his right to confrontation.

Quichocho takes issue with the following statements from the redacted recording:

> DETECTIVE GRANNEMAN: And it's tough when you're going to—you're going to sit there and you say, "Well, I—I don't know how I can be involved. I don't know any of these people." I mean, you're not—you're not helping yourself out.
>
> MR. QUICHOCHO: Right.
>
> DETECTIVE GRANNEMAN: And you're not helping us disprove things. Because, to be quite honest with you, man, I don't think you're being honest with us.
>
> MR. QUICHOCHO: The situation you guys are talking about, I have no clue what you guys are talking about besides what you guys told me.

8 VRP at 907. Quichocho also argues that the following passage violated his right to confrontation and counsel should have objected.

> DETECTIVE GRANNEMAN: Okay. Brandon English knows you.
>
> MR. QUICHOCHO: I don't even know him.

[13] English adopts this argument.

DETECTIVE GRANNEMAN: Then why does he say he knows you?

8 VRP at 914.

Quichocho argues that the above exchange offers Detective Granneman's inadmissible opinion testimony regarding Quichocho's veracity and guilt. Generally, a witness may not offer testimony in the form of an opinion regarding the guilt or veracity of the defendant, because it invades the function of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, statements made during a pretrial interview and accompanying testimony at trial that assists in providing context to those statements are not the types of statements that carry a special aura of reliability usurping the province of the jury. *Id.* at 763-65; *State v. Notaro*, 161 Wn. App. 654, 669, 255 P.3d 774 (2011). Instead, such trial testimony is an account of tactical interrogation statements designed to challenge a defendant's initial story and is not opinion testimony. *Demery*, 144 Wn.2d at 764-65.

There is a strong presumption of effective assistance, and Quichocho bears the burden of demonstrating the absence of a strategic reason in counsel's agreement to the redacted recording. *McNeal*, 145 Wn.2d at 362. Thus, even if we assume without deciding whether Quichocho is correct that the recording included inadmissible opinion testimony and violated his right to confrontation, counsel's decision to agree to the redacted recording may have been a legitimate trial tactic. Here, counsel may have agreed to the playing of the redacted recording because it supported Quichocho's theory of the case—that he was not guilty of the charged offenses.

And even if counsel's performance was deficient, Quichocho has not demonstrated prejudice. The jury heard evidence that Quichocho sent a text message to English the night before the robbery. Quichocho was in possession of a cell phone that had an outgoing text message to English's cell phone on December 3 and it had received e-mails addressed to "Huss." 10 VRP at 1168-69; 1186. Lujan testified that English and Quichocho met him at his house before the robbery. And other witnesses testified that English and Quichocho were involved in the robbery. Therefore, the jury heard other evidence that Quichocho and English knew each other, and that they were both involved in the robbery. Quichocho fails to demonstrate that the trial's outcome would have been different if counsel had not agreed to the redacted recording of his police interview.

F. STATEMENT OF ADDITIONAL GROUNDS (SAG)[14]

Quichocho argues that (1) his counsel was ineffective for (a) "failing to bring to surface this six photomontage [sic]. And fail[ing] to object to the single photo that was admitted"; and (b) not excluding jurors 7 and 8; and (2) the State failed to prove beyond a reasonable doubt that he was the "Lil Huss" contact in English's phone. SAG at 2-3.

A SAG must adequately inform this court of the nature and occurrence of alleged errors. *State v. Gauthier*, 189 Wn. App. 30, 43-44, 354 P.3d 900 (2015), *review denied*, 185 Wn.2d 1010 (2016). Issues involving facts outside of the record are properly raised in a personal restraint

[14] English also filed a SAG raising additional claims. However, English's untimely filing, more than 30 days after his counsel served him with appellant's brief and mailed a notice advising him of the substance of RAP 10.10(d), precludes review. RAP 10.10(d).

petition, rather than a SAG. *McFarland*, 127 Wn.2d at 335. And we are "not obligated to search the record in support of claims made in a defendant's [SAG]." RAP 10.10(c).

1. Ineffective Assistance of Counsel

a. The photo montage

Quichocho argues that his counsel was ineffective for "failing to bring to surface this six photomontage [sic]. And failing to object to the single photo that was admitted." SAG at 2. Quichocho's argument is unclear. He asserts that both a photo montage and a single photo should have been admitted. However, he does not indicate what single photo or related exhibit number was admitted, nor does he include copies of the exhibits in the record on appeal. The record reveals that numerous photographs were admitted, as well as multiple photo montages. And the trial court admitted the photo montages that identified Quichocho and were signed by Horn and Bondy. Quichocho fails to adequately inform us of the nature and occurrence of any alleged error.

To the extent Quichocho's claim regarding counsel's failure to "bring to surface" a photo montage involve an allegation that counsel failed to investigate, such a claim involves facts outside the record and are not properly raised in a SAG. SAG at 2.

To the extent Quichocho claims that counsel was ineffective for failing to object to the admission of a single photograph, we do not address it. Quichocho's argument does not identify what photograph counsel should have objected to, and we are not required to scour the record to find support for this claim.

b. Juror challenges

Quichocho argues that his trial counsel was ineffective for failing to challenge jurors 7 and 8. During voir dire, juror 7 reported: "[M]y home was robbed while we were in it in the middle of the night," but that there was no contact with whomever broke in. 2 VRP at 196-97. Juror 8 reported that her ex-husband kidnapped her at gunpoint in 1979, and that the experience "could affect [her]." 2 VRP at 199. The State asked, "Now, are you saying that you don't think you could be impartial or you're just not sure?" and juror 8 responded: "I'm just not sure." 2 VRP at 199-200.

"The failure of trial counsel to challenge a juror is not deficient performance if there is a legitimate tactical or strategic decision not to do so." *Johnston*, 143 Wn. App. at 17; *State v. Alires*, 92 Wn. App. 931, 939, 966 P.2d 935 (1998). And our courts have recognized that "[i]t is a legitimate trial strategy not to pursue certain matters during voir dire in order to avoid antagonizing potential jurors." *Johnston*, 143 Wn. App. at 17. There is a strong presumption of effective assistance, and Quichocho bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *McNeal*, 145 Wn.2d at 362.

Quichocho fails to rebut the strong presumption of effective assistance. The remarks that Quichocho identifies as evidence of bias are equivocal and do not establish any probability that the jurors had an actual bias against him. *See State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). Furthermore, there may have been legitimate strategic reasons for counsel's decision to avoid challenging these jurors. For example, because the evidence of bias was not established, or was equivocal at best, a challenge to the jurors would have required further questioning of the

jurors. "Excessive questioning or a failed challenge to these jurors could have caused antagonism toward" Quichocho. *Johnston*, 143 Wn. App. at 17. Therefore, defense counsel may have decided to forgo a challenge that would necessarily require further questioning of the jurors and risk inadvertently antagonizing the jurors against Quichocho. Because defense counsel's decision to not challenge jurors 7 and 8 may have been part of a legitimate trial strategy, and Quichocho fails to argue otherwise, his argument that counsel provided ineffective assistance fails.

Moreover, even if counsel's performance was deficient, Quichocho nonetheless fails to establish prejudice. While jurors number 7 and 8 had both experienced similar crimes committed against them, those facts in and of themselves do not prove that they were biased against him nor does it prove that had they been excluded, the result of the proceeding would have been different. As discussed above, the evidence supporting English's and Quichocho's convictions was overwhelming. Lujan, Bondy, and Horn identified English and Quichocho as being involved in the robbery. Lujan testified that he reported Quichocho was driving a dark gray Chevrolet Impala with a Guam sticker on the rear window and police later located a matching vehicle at Quichocho's residence. Lujan, Bondy, and Horn also testified that Quichocho pointed a gun at them during the robbery. Detective Granneman testified that cell phone records from the phone found on Quichocho's person revealed an outgoing text message to English's cell phone on December 3. Therefore, even if counsel's performance was deficient, Quichocho still fails to prove prejudice. His ineffective assistance of counsel claim fails.

2. Identifying Quichocho as "Lil Huss"

Quichocho argues that trial court improperly admitted the "Lil Huss" contact entry and text messages in English's cell phone and allowed the State to argue that he was associated with the nickname because the State failed to prove that the contact entry was associated with him. SAG at 3. Quichocho's claim fails.

We review the trial court's admission of evidence for an abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *State v. Barnett*, 104 Wn. App. 191, 199, 16 P.3d 74 (2001). "Appellate courts cannot substitute their own reasoning for the trial court's reasoning, absent an abuse of discretion." *State v. Lord*, 161 Wn.2d 276, 295, 165 P.3d 1251 (2007). We will not reverse based on an error in admitting evidence if it does not result in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Prejudice results if, within a reasonable probability, the error materially affected the outcome of the trial. *Id.*

Here, the trial court did not abuse its discretion in admitting the "Lil Huss" contact entry and text messages from English's phone. At trial, the State presented evidence that Quichocho used the nickname "Huss" and "Lil Hustler." 7 VRP at 810. The State also presented evidence that Quichocho's girlfriend's cell phone, which was found on Quichocho's person, showed an outgoing text message to English's cell phone on December 3 and received e-mails addressed to "Huss." 10 VRP at 1168-69, 1186. The State then moved to admit a contact entry and text messages that were sent between English and "Lil Huss." Given the evidence, the trial court did not abuse its discretion in admitting the evidence.

However, even if we hold that the trial court did abuse its discretion in admitting the "Lil Huss" contact entry and text messages in English's cell phone, we still hold that Quichocho's claim fails because he fails to prove the requisite prejudice as described in Section F.1.b. As discussed above, the evidence supporting Quichocho's conviction was overwhelming.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, P.J.

Sutton, J.