IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EUGENIO COLON, III, Appellant.	No. 39246-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — After a jury found Eugenio Anthony Colon, III guilty of second degree assault, unlawful imprisonment, and felony harassment, the trial court imposed an exceptional sentence. Colon appeals, arguing that the evidence was insufficient to support his convictions and the aggravating factors supporting his exceptional sentence, that the jury was instructed improperly on one of those factors, that his sentence was excessive, and that his offender score was miscalculated because his crimes constituted the same criminal conduct. In a pro se statement of additional grounds, he contends that he received ineffective assistance of counsel.[1] We affirm Colon's convictions but remand for resentencing within the standard range.

[1] RAP 10.10.

Facts

Shortly after Rigoberto Zalaya met Colon and his girl friend, Brenda Brown, the three moved into a studio apartment. There was some difficulty in paying the first month's rent; Colon asked Zalaya for additional money.

Toward the end of the month, Zalaya was sleeping in the apartment when he awoke to find Colon holding a meat knife to his throat and demanding money. Joshua and Brian Clark, who lived in the same apartment building, were with Colon. The three started hitting Zalaya and told him that if he called the police, they would kill him. They put him against the wall and continued to hit him while Colon took Zalaya's wallet and money.

They then pushed Zalaya into the Clarks' apartment, claiming that he needed to give $400 to Colon. Once he was inside the Clarks' apartment, they put socks in his mouth and continued to hit him. After heating a butter knife with a lighter, one of the Clarks used the hot knife to burn Zalaya. Colon left the apartment during the attack but later returned.

After keeping Zalaya in their apartment for more than three hours, the Clarks sent him back to his apartment. Zalaya left the following morning and called the police, who arrested Colon a few days later.

The State charged Colon with first degree kidnapping, first degree robbery, and second degree assault, all with deadly weapon enhancements. The State also charged Colon with second degree assault based on torture and felony harassment. The State gave notice that it would seek an exceptional sentence based on the aggravating factors of deliberate cruelty and invasion of privacy. Colon and the Clarks were initially codefendants, but their cases were severed pursuant to the State's motion. Following a suppression hearing, the trial court ruled that Colon's pre- and

post-arrest statements to law enforcement were admissible.

At Colon's trial, Zalaya testified to the facts cited above. He added that Colon left the Clarks' apartment before the Clarks burned him but came back later. He said that when he tried to leave the Clarks' apartment, they would not let him and threatened to kill him, and he believed their threat. He also testified that after leaving the apartment he shared with Colon and Brown the following day, he did not return because he was afraid.

Officer Christopher Blanchard interviewed Zalaya shortly after the attack and observed burns on his arm, nose, ear, and forehead. He also saw a faint mark on Zalaya's abdomen. His photographs of those injuries were admitted as evidence.

Officer Blanchard also interviewed Colon, who initially denied any knowledge of an assault or burning. The officer then took a statement from Brown. When confronted with Brown's statement at a second interview, Colon admitted telling her that "his boys" had taken care of Zalaya and burned him. Colon also told Blanchard that Zalaya had failed to acknowledge him when he entered their apartment and was disrespectful. As a consequence, Colon walked Zalaya over to the Clarks' apartment and made him sit down. One of the Clarks then stuffed a sock into Zalaya's mouth and put a heated knife next to his ear. Colon initially said he never saw a knife touch Zalaya, but he later said that after Joshua Clark heated a butter knife with a lighter and held it up to Zalaya's ear, he saw Zalaya flinch. When shown the photographs of Zalaya's burns, Colon said one could have happened when Joshua Clark put the knife to Zalaya's ear. Colon added that he told Zalaya several times that he and the Clarks were just playing and joking. A search of Colon's apartment did not reveal any weapons.

Brown testified that Colon told her that his boys handled Zalaya because he was

disrespectful and owed Brown and Colon money. She said Colon mentioned heating knives and burning Zalaya. Defense witness Annette Aughtry testified that Colon was in her apartment most of the night, except for a five-minute interval. Another witness testified that Zalaya told him that Colon was involved in the attack for 20 minutes and only hit Zalaya on the chest.

The jury acquitted Colon of kidnapping, robbery, and second degree assault with a deadly weapon. The jury convicted him of the lesser included offense of unlawful imprisonment, second degree assault based on torture, and felony harassment. The jury also found that the crimes were committed with both aggravating factors that the State alleged.

At sentencing, Colon argued that his offenses constituted the same criminal conduct, but the trial court disagreed and counted them separately. The court imposed an exceptional sentence of 30 months. Colon appeals his convictions and sentence.

Discussion

Sufficiency of the Evidence: accomplice liability

Colon argues initially that the evidence was insufficient to prove that he was an accomplice to the Clarks' second degree assault of Zalaya.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the

evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

The accomplice liability statute requires a mens rea of knowledge and an actus reus of soliciting, commanding, encouraging, or requesting the commission of the crime, or aiding or agreeing to aid in the planning of the crime. *State v. Roberts*, 142 Wn.2d 471, 502, 14 P.3d 713 (2000). The legislature intended to impose accomplice liability only on those having "'the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*.'" *Roberts*, 142 Wn.2d at 510 (quoting Model Penal Code § 2.06 cmt. 6(b) (1985)). Accordingly, to be deemed an accomplice, an individual "must have acted with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged," rather than any and all offenses the principal may have committed. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); *see also* RCW 9A.08.020(3). Whether principal or accomplice, the defendant's liability is the same. *State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005).

Colon argues that the evidence does not show that he commanded the Clarks during their assault of Zalaya. He contends that there is no evidence that he instigated or facilitated the assault and no evidence that he knew the Clarks would burn Zalaya. The State responds that the evidence shows that the Clarks assaulted Zalaya to address Colon's grievances. Zalaya testified that he awoke to Colon's demand for money, that Colon pushed him into the Clarks' apartment, and that Colon participated in the beating that ensued. Although Zalaya said Colon left before the burning began, he added that Colon returned to the Clarks' apartment before Zalaya was allowed to leave. Colon admitted that he escorted Zalaya to the Clarks' apartment for being disrespectful and that he saw Zalaya flinch when Joshua Clark held the heated knife to his ear. Instead of

intervening, Colon left the apartment. Furthermore, Colon told Brown that "his boys" had taken care of the problem with Zalaya and that Zalaya had been burned with a heated knife. When viewed in the light most favorable to the State, this evidence is more than sufficient to show that Colon both instigated and promoted the second degree assault of Zalaya.

Sufficiency of the Evidence: Unlawful Imprisonment

Colon next argues that any force and restraint used against Zalaya was merely incidental to the assault and cannot support a separate charge of unlawful imprisonment.

A person commits unlawful imprisonment if he knowingly restrains another. RCW 9A.40.040(1). To restrain someone is to restrict their movements without consent and without legal authority in a manner that interferes substantially with that person's liberty. RCW 9A.40.010(1). Restraint is without consent if it is accomplished by physical force or intimidation. RCW 9A.40.010(1)(a). A substantial interference is a real or material interference with liberty, as opposed to a petty annoyance, slight inconvenience, or imaginary conflict. *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff'd*, 92 Wn.2d 357, 597 P.2d 892 (1979).

Colon's argument is based largely on *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In *Green*, the court found insufficient evidence to support a conviction of aggravated murder based on kidnapping. 94 Wn.2d at 219. The separate offense of kidnapping was not proven as required because the victim's restraint was merely part of the homicide that occurred 2 to 3 minutes later and not more than 60 feet from the victim's original location.

> Considering the unusually short time involved, the minimal distance the victim was moved . . . , the location of the participants when found, the clear visibility of that location from the outside as well as the total lack of any evidence of actual isolation from open public areas, there is no substantial evidence of restraint by means of secreting the victim in a place where she was not likely to be found. . . .

> . . . While movement of the victim occurred, the mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping.

Green, 94 Wn.2d at 226. As support, the court cited the following excerpt from a Michigan assault case:

> "[U]nless the victim is removed from the environment where he is found, the consequences of the movement itself to the victim are not independently significant from the assault—the movement does not manifest the commission of a separate crime—and punishment for injury to the victim must be founded upon crimes other than kidnapping."

Green, 94 Wn.2d at 227 (quoting *People v. Adams*, 389 Mich. 222, 236, 205 N.W.2d 415 (1973)).

Another defendant cited *Green* in arguing that insufficient evidence supported his unlawful imprisonment conviction because the restraint involved was only incidental to the ongoing assault of his girl friend. *State v. Washington*, 135 Wn. App. 42, 50, 143 P.3d 606 (2006), *review denied*, 160 Wn.2d 1017 (2007). Division One of this court disagreed, finding that the assaults were a reaction to the victim's resistance to the restraint and that the restraint was not merely incidental to the assaults. *Washington*, 135 Wn. App. at 51.

In this case, Zalaya was removed from his apartment against his will and pushed into the Clarks' apartment. He was removed from the environment in which he was found and isolated in another. This conduct constituted a substantial inference with Zalaya's liberty and is sufficient to constitute unlawful imprisonment. Once inside the Clarks' apartment, Zalaya was subjected to an ongoing physical assault that included being burned with a hot knife. The two crimes had separate purposes and separate harm, and the evidence was sufficient to support separate convictions.

Sufficiency of the Evidence: Felony Harassment

Colon argues here that the evidence was insufficient to prove his conviction of felony harassment because Zalaya demonstrated by his conduct following the assault that he did not fear for his life.

To convict a defendant of felony harassment based on a threat to kill, the State must prove that the person threatened was placed in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(a)(i); *State v. Mills*, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005). Our Supreme Court found insufficient evidence of such a threat where the juvenile defendant told a school vice-principal that she would kill him, and the vice-principal testified that her threat caused him concern. *State v. C.G.*, 150 Wn.2d 604, 607, 610, 80 P.3d 594 (2003). "[A] conviction of felony harassment based upon a threat to kill requires proof that the person threatened was placed in reasonable fear that the threat to kill would be carried out." *C.G.*, 150 Wn.2d at 606.

Zalaya testified that Colon threatened to kill him if he went to the police and that he believed the threat. Colon contends, however, that Zalaya's behavior after the assault undermines this testimony, as it shows that he went back to the apartment he shared with Colon and stayed there until morning. Zalaya testified that once back in the shared apartment, he still was afraid and could not sleep. Instead of demonstrating that he was no longer fearful, this conduct could show that he delayed going to the police because he feared Colon would carry out his threat. In any event, when viewed in the light most favorable to the State, the evidence was sufficient to show that Zalaya believed Colon would carry out his threat to kill him if he went to the police.

Exceptional Sentence

Colon raises several challenges to the exceptional sentence the trial court imposed. He argues that insufficient evidence supports the aggravating factors, that the jury instructions did not sufficiently define one of those factors, that his sentence was clearly excessive, and that his offenses should have counted as one, for purposes of calculating his offender scores, under the same criminal conduct rule.

A. Deliberate Cruelty

Colon's first sentencing challenge is to the sufficiency of the evidence supporting the aggravating factor of deliberate cruelty. He contends that his second degree assault conviction already accounts for any cruelty he exhibited and that the aggravating factor based on the same conduct does not justify an exceptional sentence.

When the offender's conduct during the commission of the crime manifests deliberate cruelty to the victim, the trial court may impose an exceptional sentence. RCW 9.94A.535(3)(a); *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). Deliberate cruelty consists of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996). To justify an exceptional sentence, the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the class of crimes at issue. *Tili*, 148 Wn.2d at 369. "An exceptional sentence is not justified by mere reference to the very facts that constituted the elements of the offense proven at trial." *State v. Ferguson*, 142 Wn.2d 631, 648, 15 P.3d 1271 (2001). Rather, to justify an exceptional sentence, the deliberate cruelty must be atypical of the crime. *State v. Atkinson*, 113 Wn. App. 661, 671, 54 P.3d 702 (2002), *review denied*, 149 Wn.2d 1013 (2003).

Where the defendant was convicted of assault based on his infliction of grievous bodily harm, the court rejected an aggravating factor based on his infliction of first and second degree burns, observing that the nature of the injuries inflicted were already accounted for in determining the presumptive sentence range for second degree assault and could not be counted a second time to justify an exceptional sentence. *State v. Armstrong*, 106 Wn.2d 547, 550-51, 723 P.2d 1111 (1986); *but see State v. Russell*, 69 Wn. App. 237, 253, 848 P.2d 743 (where statute proscribes behavior that could be described as deliberately cruel, defendant may engage in gratuitous violence more egregious than typical that justifies an exceptional sentence), *review denied*, 122 Wn.2d 1003 (1993).

The State argued to the jury that the same conduct—burning Zalaya with a heated knife—supported the second degree assault charge based on torture and the deliberate cruelty aggravating factor. It would appear that the legislature already accounted for the burning by including torture as an element of second degree assault. As the trial court instructed the jury, "torture" means the infliction of severe or intense pain as punishment or coercion, or for sheer cruelty. *State v. Brown*, 60 Wn. App. 60, 65, 802 P.2d 803 (1990), *review denied*, 116 Wn.2d 1025 (1991), *overruled on other grounds by State v. Chadderton*, 119 Wn.2d 390, 832 P.2d 481 (1992). The State argues on appeal, however, that Colon's conduct concerning all three convictions demonstrated psychological and emotional cruelty that went beyond the physical cruelty already encompassed within his assault conviction. As support, it cites *Atkinson*, in which Division Three found sufficient evidence of deliberate cruelty beyond that necessary for the underlying conviction of second degree assault based on reckless infliction of substantial bodily harm.

> The evidence showed that Mr. Atkinson's attack of Ms. Paul was unprovoked, that he hit her, knocked her to the floor, tore her clothes off while continuing to hit and kick her, and then locked her outside, in the cold and rain while she was still naked. When she managed to get back in the house, he did it all over again. In addition, he told her to prostitute herself and threatened to kill her. Mr. Atkinson's conduct toward Ms. Paul was cruel beyond that normally associated with a typical assault and showed an intent to inflict pain as an end in itself. Similarly, Mr. Atkinson's behavior was intended to degrade and humiliate Ms. Paul.

Atkinson, 113 Wn. App. at 671.

The conduct at issue here does not demonstrate the same level of psychological cruelty. Moreover, the crimes of felony harassment and unlawful imprisonment already encompass a certain degree of psychological distress. Finally, the assault charge in *Atkinson* was not based on torture, as it is here. We agree that the evidence was insufficient to show that Colon committed any of his offenses with the atypical cruelty necessary to support the aggravating factor of deliberate cruelty.

B. Invasion of Privacy

Colon also challenges the sufficiency of the evidence supporting the "invasion of privacy" aggravating factor. Because the trial court noted that either of the aggravating factors the jury found was sufficient to support Colon's exceptional sentence, we address this factor as well. *See State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) (reviewing court may uphold exceptional sentence after overturning aggravating factor if satisfied that trial court would have imposed same sentence based on valid factor).

The invasion of a victim's zone of privacy justifies imposition of an exceptional sentence. RCW 9.94A.535(3)(p); *State v. Coleman*, 152 Wn. App. 552, 566, 216 P.3d 479 (2009). This factor frequently applies when a crime occurs in a victim's home. *See State v. Hernandez*, 54 Wn.

App. 323, 327, 773 P.2d 857 (1989) ("Our citizens have an expectation upon arriving at their residence that they are in a protected zone."), *reversed on other grounds by State v. Batista*, 116 Wn.2d 777, 808 P.2d 1141 (1991); *State v. Falling*, 50 Wn. App. 47, 55, 747 P.2d 1119 (1987) (rape of victim in her bedroom was invasion of her zone of privacy); *State v. Ratliff*, 46 Wn. App. 466, 469-70, 731 P.2d 1114 (1987) (tire slashing and fear engendered in victim by defendant's knowledge of her new residence showed invasion of victim's private life).

Here, however, Colon and Zalaya shared an apartment, and Colon had just as much a right to enter it as Zalaya did. Zalaya did not have his own bedroom; the apartment had only one room. Unless awakening a victim from sleep constitutes an invasion of privacy, that aggravating factor is not satisfied here. We find the evidence insufficient to show an invasion of the victim's zone of privacy.

Given this conclusion, we need not address Colon's related claim of error concerning the trial court's failure to define "invasion of privacy" for the jury. Nor do we address the argument that his exceptional sentence is clearly excessive. Having invalidated the aggravating factors supporting that sentence, we must remand for resentencing within the standard range. *See State v. Hale*, 146 Wn. App. 299, 307, 189 P.3d 829 (2008) (exceptional sentence upheld only if record supports jury's special verdict on aggravating factors).

C. Same Criminal Conduct

Our invalidation of Colon's exceptional sentence does not render his same criminal conduct argument moot because the trial court's calculation of his offender scores necessarily affects its calculation of any standard range sentence. Colon argues here that his three offenses should count as one under the same criminal conduct rule.

Current convictions are generally counted as prior convictions for purposes of calculating the defendant's offender score. RCW 9.94A.589(1)(a). Separate convictions count as one under the same criminal conduct rule, however, if they were committed at the same time and place, involved the same victim, and required the same objective criminal intent. RCW 9.94A.589(1)(a); *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The legislature intended the same criminal conduct provision to be construed narrowly, and we will reverse a same criminal conduct determination only on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).

Colon argued below that his three offenses were the same criminal conduct because they were committed at the same time and place against the same victim and because his criminal intent never changed. "In this case, the criminal intent . . . was to essentially procure money from Mr. Zalaya. That was the intent at all times." Report of Proceedings (RP) (Apr. 29, 2009) at 8. The trial court disagreed.

> I think in this case . . . the motive was the same throughout, I agree with that. The motive was—to try to get money, and it stayed the same throughout the entire process. But the intent of the Unlawful Imprisonment was to take him to an area and keep him in an area where he couldn't be found, or at least to intimidate him, by that act.
>
> The intent of the Assault was to inflict pain . . . if I accept your argument, . . . then once you have an Unlawful Imprisonment, then whatever you do [to] the individual doesn't increase the punishment. He can assault, and burn him, and inflict pain upon him, and it all continues and there's no additional punishment for what you do after the person is taken to the area and secreted in the area.
>
> I think that's bad public policy. I think that sends the wrong message. I don't think that's what the Legislature intended. . . .
>
> . . . .
>
> . . . [T]he burning was the basis for the Assault, it was the rationale, and I'm satisfied that—that it—it's a separate, different intent.
>
> . . . I'm going to hold that they are separately punishable.

RP (Apr. 29, 2009) at 10-11.

Contrary to Colon's assertion, this decision does not constitute an abuse of discretion. In the same criminal conduct context, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030 (1990). Here, the crimes had different purposes: the harassment was intended to prevent Zalaya from going to the police, the unlawful imprisonment was meant to remove him to an isolated area, and the assault was meant to inflict pain. Moreover, even though the crimes were sequential, Colon had the opportunity, after completing each offense, to reflect and form a new intent to commit an additional crime. *See State v. Wilson*, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (where the defendant had time to complete the assault and form a new intent to threaten the victim, the crimes of assault and felony harassment had different objective intents and were not the same criminal conduct); *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (defendant had time after first rape to form intent to commit the second, so the two rapes counted separately). The trial court did not abuse its discretion in rejecting Colon's same criminal conduct argument.

Statement of Additional Grounds: Ineffective Assistance of Counsel

In a pro se statement, Colon argues that he received ineffective assistance from his trial attorney. Colon contends that defense counsel (1) failed to make the judge excuse a juror after a witness intimidated the juror by pointing to him, (2) did not want certain defense witnesses to testify, (3) became irritated when Colon rejected proffered plea bargains and was late in keeping his appointments with Colon as a consequence, (4) failed to bring him proper clothing to wear at

trial, (5) failed to ask Zalaya "all the right questions" after he made contradictory statements and perjured himself while testifying, (6) failed to inform Colon of and lied about "many things," (7) made weak opening and closing arguments, (8) refused to bring up topics Colon suggested, and (9) allowed a defense witness to testify while wearing his jail clothing. Colon argues further that his attorney failed to bring up strong arguments to prove his innocence—namely, that Zalaya said Colon was not present when he was burned, that Colon never told Brown that one of the Clarks burned Zalaya, and that Zalaya had an interpreter when he testified but not when he gave his statement to the police, thereby undermining Officer Blanchard's testimony. Colon attaches a copy of an undated letter he allegedly wrote to the trial judge, asking for a new attorney.

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficiency was prejudicial. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). An attorney's representation was deficient if it fell below an objective standard of reasonableness. *Saunders*, 91 Wn. App. at 578. We presume that counsel provided reasonable assistance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Saunders*, 91 Wn. App. at 578.

Colon's assertions of ineffective assistance fail to satisfy both prongs of the standard cited above. Some are too general to support his claim, others are unsupported by the record. Those in the latter category include his assertion that a juror was intimidated when a witness pointed at him as well as the claim that a defense witness wore jail clothing while testifying. The record shows that the trial judge admonished a defense witness for pointing to the jurors and that one defense witness testified that he was incarcerated. It does not show that a juror was intimidated

or that the witness wore jail clothing. Consequently, we do not discuss these assertions further. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (where ineffective assistance claim is brought on direct appeal, reviewing court will not consider matters outside the record).

The claims that Colon's attorney did not want certain witnesses to testify, failed to ask the victim the right questions, failed to bring up topics Colon suggested, lied about things and made weak opening and closing arguments are too vague to demonstrate either deficient performance or prejudice. To the extent that Colon contends that defense counsel ignored Zalaya's perjury, we note that the fact that Zalaya made contradictory statements on the witness stand does not establish that he committed perjury. *See Nessman v. Sumpter*, 27 Wn. App. 18, 24, 615 P.2d 522 (contradictory statements are not direct evidence of falsity that perjury requires), *review denied*, 94 Wn.2d 1021 (1980). Colon's additional claim that his attorney became irritated when he did not accept the plea bargains offered and was late in keeping appointments does not show prejudice. Similarly, even if counsel did not provide Colon with proper clothing, Colon explains that Brown did, so he can show no prejudice from this alleged failing.

With regard to counsel's failure to explore exculpatory arguments, we first note that defense counsel did argue in closing that Colon was not present when Zalaya was burned. Second, the fact that Colon now has his own interpretation of the comments he made to Brown does not demonstrate that his attorney was deficient in exploring those comments at trial. Third, while Zalaya did have an interpreter at trial, Officer Blanchard testified that the two spoke in English. When Zalaya had difficulty with words, the officer asked for clarification, and the two communicated in that manner. The officer explained on cross-examination that he felt confident about communicating with Zalaya in English. Defense counsel thus explored the issue of

communication, and we see no deficiency on this record. Finally, the undated letter Colon attaches is of no relevance since it was never filed and is not part of the record.

We affirm Colon's convictions but remand for resentencing.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

WORSWICK, A.C.J.

HARTMAN, J.P.T.