IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. OZIEL V. SUAREZ, Appellant.	No. 41005-2-II (Consolidated with No. 41048-6-II) UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. DEVAN IDRIS HOPSON, Appellant.	

Quinn-Brintnall, J. — On June 28, 2010, a jury found Oziel Suarez and Devan Hopson guilty of attempted first degree robbery and first degree assault for their roles in a Tacoma shooting incident. The jury also found by special verdict that Suarez and Hopson were armed with deadly weapons during the commission of these crimes. On appeal, Suarez and Hopson both contend that the trial court erred in limiting the testimony of Suarez's longtime girlfriend,

Traniece Armstrong, and in instructing the jury that it needed to unanimously agree to enter a not guilty finding on the special verdicts. Hopson also contends that the evidence was insufficient to support his attempted robbery conviction. Suarez also argues that the trial court erred in ruling that he voluntarily waived his *Miranda*[1] rights while being treated for a gunshot wound and, in a statement of additional grounds[2] (SAG), that the State's charging document did not fully apprise him of the charges against him and that he received ineffective assistance of counsel. We affirm Suarez's and Hopson's convictions.

Issues are presented by both appellants' sentences. Suarez contends that the trial court miscalculated his baseline sentence. And although appellate counsel for both Suarez and Hopson failed to recognize that the jury's special verdict findings supported a deadly weapon rather than a firearm enhancement, we raised this issue sua sponte at oral argument in the interest of justice.[3] The State conceded that if the jury's special verdict supported only a deadly weapon enhancement, imposing a firearm enhancement was error.[4] Because the jury's findings supported deadly weapon, but not firearm, sentence enhancements, and because the trial court miscalculated the length of Suarez's total confinement, we vacate Suarez's and Hopson's sentences and remand for resentencing.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] RAP 10.10.

[3] RAP 12.1(b). The appellants and the State both filed statements of additional authority on this subject after oral argument.

[4] Wash. Court of Appeals, *State v. Suarez and Hopson*, Nos. 41005-2-II, 41048-6-II, oral argument (Apr. 13, 2012), at 13 min., 40 sec. (on file with the court).

FACTS

Background

On June 27, 2009, Tacoma Police Department officers responded to a reported shooting in the area of 702 S. Huson and S. 12th Streets. Inside the home at 702 S. Huson, police found one of the residents, Roshawn Laster-Cobb, lying on a mattress in a bedroom and a "handgun, semiautomatic Glock pistol" nearby. 3 Report of Proceedings (RP) at 220. Laster-Cobb had been shot multiple times, but he was conscious and able to cooperate with police. The other resident of 702 S. Huson, Jeremy Patchell, was not there when police arrived. Officers found two other participants in the altercation, Hopson and Suarez, near a retaining wall at 6th Avenue and S. Huson. Hopson had suffered a grazing bullet wound to the head and Suarez had been shot in the abdomen.

Tacoma Police Detective Brian Vold observed that "there [were] drugs present at the scene. It appeared that both sides of this conflict had weapons. The hour of the day, the location, it appeared to be some sort of drug deal had gone bad." 6 RP at 682. Vold discovered a bag containing $595 at the scene. Vold also located two .45 caliber casings and six 10 mm casings inside the home along with an unfired rifle cartridge in the driveway. The .45 caliber casings were found near the home's front door while the 10 mm casings were found much further into the home's interior.

In addition, Detective Vold followed a trail of blood leading from the gravel in front of the 702 S. Huson home to a house about a block away. Detectives discovered an assault rifle and a .45 caliber pistol in a recycling bin at that location. There appeared to be blood on both weapons. Officers then followed the blood trail from the recycling bins to the retaining wall where police

first contacted Hopson and Suarez. A crime lab technician later verified that both firearms were operational, that the .45 caliber had been fired twice, and that no live cartridges had been fired from the assault rifle. Police found Suarez's fingerprints on the assault rifle.

Tacoma Police Detective Daniel Davis interviewed a number of suspects associated with the shooting, including Hopson and Derrick Cleary, a person who approached police shortly after they arrived at the scene. Davis spoke with Hopson at about 3:45 am the morning after the incident. Davis stated,

> After a few minutes of prompting [Hopson] to be truthful, he began to provide more information. Hopson admitted that he and others had been driving around with [Cleary] earlier in the evening. He said they had driven to Point Defiance for a short time and then decided to go to JP's house. JP was someone we had identified as Jeremy Patchell. [Patchell] is a friend of [Cleary's], and Hopson had never met him before tonight. Hopson said that when [Cleary] pulled into the driveway, [Patchell] was on the porch. He greeted [Cleary] and they went inside the house. Hopson was following behind. Hopson said he had only made it as far as the doorway of the house when the shooting began. He observed a black male from within the living room of the home shooting toward him. Hopson said he did not recognize the shooter and he did not feel he had ever seen him before. Hopson maintained the shooting was unprovoked and . . . [t]hat neither he nor anyone he was with were armed with guns. Hopson said that the black male fired multiple rounds.

4 RP at 278.

Detective Davis interviewed Cleary for approximately an hour and a half and then arrested him on first degree assault and robbery charges. When Davis located Patchell a few days after the incident, Patchell admitted that he was at the home when the shootings occurred. Patchell told Davis that he knew Cleary prior to the incident but that he was unfamiliar with Suarez and Hopson. After being shown a photomontage, Patchell indicated that he was "pretty sure that this is the guy [Hopson] that was with" Cleary. 4 RP at 300. Patchell had no difficulty recognizing

Suarez in a photomontage. Although Laster-Cobb was unable to identify either Cleary or Hopson in photomontages, he immediately identified Suarez, stating, "That's him. That's the guy with the rifle." 4 RP at 306. Police interviewed Suarez in the hospital while he was being treated for the gunshot wound he received during the incident.

On June 29, 2009, the State charged Hopson, Suarez, and Cleary with first degree assault and first degree robbery with "firearms or deadly weapon" enhancements for both charges. RCW 9A.36.011(1)(a), RCW 9.41.010, RCW 9A.56.190, RCW 9.94A.530. Cleary pleaded guilty to second degree robbery. The State later amended the charges against Hopson and Suarez, reducing both of their first degree robbery charges to attempted first degree robbery.

Procedure

Trial commenced on June 8, 2010. At a pretrial CrR 3.5 hearing, the trial court concluded that all of Hopson's and Suarez's custodial statements would be admissible for the purposes of trial.

At trial, Laster-Cobb testified that he came home around 8:30 or 9:00 pm on the day of the shooting to learn that his roommate, Patchell, had set up a drug deal. As the deal began, two people walked in and as Patchell was moving to shut the door, "another guy puts his foot inside of the door . . . and he tells [Patchell], 'Where the fuck is the money at, white boy?'" 4 RP at 360. Laster-Cobb related that Suarez shot him with the assault rifle while he returned fire with his own gun but that he never saw Hopson holding a gun or shooting at him.

Patchell gave a similar, though slightly varied, version of events. According to Patchell, he called Cleary to set up the drug deal for a large amount of Oxycontin (over $8,000 worth) on Laster-Cobb's behalf. Patchell testified that four people, including Cleary, Hopson, and Suarez,

arrived at the scene in Cleary's vehicle. Patchell related that Cleary and Hopson came inside the home and as Patchell was attempting to close the door, Suarez blocked the door and then put a "big-ass gun to [his] face." 5 RP at 531. After the shooting began, Patchell managed to escape through a bedroom window.

Cleary testified that Patchell contacted him to arrange the deal and, acting as a middleman, he contacted Suarez to see if he could obtain the large amount of drugs being requested. Cleary picked up Suarez and Hopson around 8:00 pm and, after the parties agreed to meet at Patchell's home, drove them there. Cleary testified that after arriving at 702 S. Huson, he and Hopson went inside and moments later, Suarez came inside attempting to rob Patchell and Laster-Cobb and the shooting began. Cleary escaped the shooting unharmed and ran to a neighboring house to wait for police after calling 911.

Suarez testified at trial that he and Hopson had planned to go with Cleary to a nightclub that evening. He testified that Cleary stopped at Patchell's to pick something up and, inexplicably, he and Hopson ended up with gunshot wounds. Suarez's longtime girlfriend also testified, although the trial court excluded much of her testimony because it related to an alleged conversation she had with Cleary, and Suarez failed to properly lay a foundation to impeach Cleary.

A jury found Hopson and Suarez guilty of attempted first degree robbery and first degree assault on June 28, 2010. The jury also found by special verdict that Hopson and Suarez committed each crime while armed with a deadly weapon. At sentencing, Hopson received a sentence of 270 months confinement while Suarez received a 282-month sentence, both including 96-month firearm enhancements. Both appellants timely appeal.

DISCUSSION

Limiting Armstrong's Testimony

Both Suarez and Hopson contend that the trial court erred in limiting the testimony of Suarez's girlfriend, Armstrong. Specifically, they contend that Armstrong's excluded testimony—a purported conversation between her and Cleary where Cleary offered her money for false testimony—would have established Cleary's bias against the defendants. We hold that the trial court did not abuse its discretion in limiting Armstrong's testimony.

We review a trial court's exclusion of evidence for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law." *State v. Lamb*, 163 Wn. App. 614, 625, 262 P.3d 89 (2011) (citing *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006)), *aff'd in part, rev'd in part on other grounds*, No. 86603-1, 2012 WL 3516890 (Wash. Aug. 16, 2012). When we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case. *State v. Whelchel*, 97 Wn. App. 813, 817, 988 P.2d 20 (1999), *review denied*, 140 Wn.2d 1024 (2000). If a trial court has erred in refusing to admit testimony, reversal is required if there is a reasonable possibility that the testimony would have changed the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

During Suarez's cross-examination of Cleary at trial, Suarez asked Cleary if he knew Armstrong and whether Cleary had spoken with her after the shooting. Cleary testified that he

had spoken to Armstrong briefly after the shooting but they "[n]ever at all talked about what happened in this incident." 7 RP at 932.

After the State rested its case, Suarez called Armstrong to testify. The following occurred while Armstrong was testifying:

> [Question from Suarez:] After this event, did you have any contact with Mr. Cleary?
> A. Actually, I did see him at the apartments, yeah.
> Q. Is that the only place you saw him?
> A. And here at the courthouse.
> Q. Okay. And do you recall when that was?
> A. It was not too long after the case and he was bailed out of jail.
> Q. Okay. What was the contact that you had with Mr. Cleary at the courthouse?
> A. He approached me asking me to write a statement. He offered me money to write a statement saying that the guns weren't his, and that they were --
>
> [Objection from the State]: I'm sorry. I'm objecting. Is this a statement of what Mr. Cleary supposedly wrote or said to her?
>
> [Suarez's counsel]: Yes. A question that he asked her.
>
> [State]: That's hearsay.
>
> [The Court]: Sustained.

8 RP at 1067-68.

Following this objection, the trial court excused the jury. During the ensuing discussion, Suarez contended that he was offering the hearsay testimony from Armstrong for the purposes of impeaching Cleary. The State countered that to impeach Cleary with Armstrong's testimony, Suarez needed to first lay a foundation by confronting Cleary with the specific allegation—something he failed to do during his cross-examination of Cleary.[5] The trial court ruled that although Armstrong's testimony was "not a collateral matter," it was still "subject to

[5] The State also argued that Suarez's trial tactics violated the rules of discovery because despite asking Suarez multiple times about the nature of Armstrong's testimony, Suarez never revealed that Armstrong would level allegations of fraud or witness tampering.

the evidentiary rules, which includes hearsay." 8 RP at 1081. The State agreed that "if [Armstrong's testimony] was admissible," it would go "to the bias issue and improper act issue, which Mr. Cleary was never confronted with." 8 RP at 1082.

The trial court instructed the jury to disregard Armstrong's statement about Cleary's offering to pay her for a false statement. When trial resumed, the court allowed Suarez—for purposes of impeachment—to ask Armstrong whether she had a conversation with Cleary about the incident and Armstrong responded that she had, but she did not divulge the details. Suarez chose not to call Cleary back to the stand to question him further about his alleged statements to Armstrong.

On appeal, Hopson and Suarez both rely exclusively on *State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009 (2003), for the proposition that Armstrong's recitation of what Cleary said to her should have been admissible as evidence of Cleary's state of mind—an exception to the rules of hearsay. In *Spencer*, the trial court excluded the testimony of a witness (Schmidt) who intended to testify at trial about statements another witness (McMullen) made to her. 111 Wn. App. at 408. During his offer of proof related to Schmidt's testimony, the defendant explained,

> Schmidt would testify that [McMullen] told her [McMullen] knows that [the defendant] did not [commit a crime] and she [spoke to police] because she was scared for herself and for her child, that the police threatened her that [Child Protective Services (CPS)] would be involved and they would take her to jail . . . unless the police were told what they wanted to hear. She will also testify about how [McMullen] was angry about the second girlfriend situation.

Spencer, 111 Wn. App. at 409. The trial court dismissed this offer of proof and denied the defendant's request to recall McMullen so that he could lay a proper foundation to ask Schmidt

about McMullen's statements to her.

On appeal, this court held that the trial court should not have excluded Schmidt's testimony because the defendant's offer of proof established that Schmidt's testimony would not be offered for the truth of the matters being asserted but, instead, would be offered to show McMullen's state of mind and bias toward the defendant:

> Regardless of whether the police actually threatened McMullen with CPS taking her child away, Schmidt would have testified to McMullen's state of mind regarding her statement to the police. As such, Schmidt's testimony would not have been hearsay and should not have been excluded on this basis.

Spencer, 111 Wn. App. at 409. Moreover, this court held that the trial court erred in refusing to allow the defendant to recall McMullen to comment on any testimony of bias after its introduction. *Spencer*, 111 Wn. App. at 411. But importantly, in *Spencer*, the defendant argued *to the trial court* that the statements in question were not hearsay. Furthermore, the trial court refused to let him recall the potentially biased witness. Neither situation exists here and, accordingly, *Spencer* is distinguishable.

First, despite extensive discussion outside the presence of the jury, neither Suarez nor Hopson alleged that they were offering Armstrong's testimony to prove Cleary's bias. To the contrary, Suarez steadfastly maintained that having asked Cleary about his discussion with Armstrong, he had properly laid the foundation to impeach Cleary through Armstrong's testimony. Second, unlike in *Spencer*, the trial court never refused a request from the defendants to recall Cleary. Hopson and Suarez chose not to exercise this option. Last, even the most generous reading of *Spencer* does not support Hopson and Suarez's contention that, without providing an offer of proof or giving the "declarant an opportunity to explain or deny the

statement after introducing the evidence," *Spencer*, 111 Wn.2d at 410, a defendant may challenge an evidentiary ruling on appeal *on a different ground* than that challenged at trial. *See State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (2008).

Because Suarez and Hopson failed to apprise the trial court of their intent to offer Armstrong's statements as evidence of Cleary's bias—and not for purposes of impeachment as the record reflects—their argument fails. The trial court did not abuse its discretion in limiting Armstrong's testimony.

Sentence Enhancement Unanimity Instruction

Next, Suarez and Hopson both contend that the trial court committed reversible error by instructing the jury that unanimity was required to answer "no" on the sentence enhancement special verdicts. Because the Supreme Court recently overturned *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), and overruled the "nonunamity rule" for special verdicts, the trial court did not err—as a matter of law—in informing the jury that it needed to agree unanimously on the answer to the special verdict. *State v. Guzman Nuñez*, 174 Wn.2d 707, 713, ___ P.3d ___ (2012).

Sufficiency of the Evidence

Hopson argues that the evidence is insufficient to support his attempted first degree robbery conviction.[6] We disagree. Because the evidence presented at trial supports a reasonable inference that Hopson assisted Suarez's attempted robbery of Patchell and Laster-Cobb, the evidence is sufficient to establish Hopson's accomplice liability for attempted first degree robbery.

Sufficiency of the evidence is a question of constitutional magnitude that the defendant

[6] Hopson does not specifically challenge his assault conviction.

may raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, 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 evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the jury to resolve issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Washington statutorily 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. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

The trial court instructed the jury that to convict Hopson of attempted first degree robbery, it had to find that "the defendant or an accomplice did an act that was a substantial step toward the commission of robbery in the first degree." Clerk's Papers (CP) (Hopson) at 96. The court also instructed the jury on accomplice liability:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

> (1) solicits, commands, encourages, or requests another person to commit the crime; or
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP (Hopson) at 83.

Here, Hopson argues that "evidence that Hopson accompanied Suarez and Cleary to the house where the drug transaction was to occur, and even evidence that he was armed at the time, was insufficient to establish his complicity in any attempt to rob Laster-Cobb, an offense of which the State has failed to show he had any foreknowledge." Br. of Appellant Hopson at 24. In support of this proposition, Hopson relies on this court's decision in *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009). In *Asaeli*, this court reversed Darius Vaielua's second degree felony murder conviction. 150 Wn. App. at 570. In that case, the evidence presented at trial established that in addition to his presence at the murder scene, (1) Vaielua spoke with his co-defendants prior to the shooting although the contents of these discussions were unknown, (2) Vaielua drove one of the aggressors to the scene, and (3) Vaielua knew that members of his group were looking for the shooting victim prior to the incident. *Asaeli*, 150 Wn. App. at 568-69. In reversing Vaielua's conviction, this court concluded that

> [a]t best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate [the victim]. But the record contains no evidence, direct or indirect, establishing that Vaielua was aware of any plan . . . to assault or shoot [the victim].
>
> The law is well settled that mere presence is not sufficient to prove complicity in a crime. *State v. Roberts*, 80 Wn. App. 342, 355-56, 908 P.2d 892 (1996). Accordingly, there was insufficient evidence to prove Vaielua's complicity

> in the shooting. His mere presence at the scene with knowledge that others were looking for [the victim] is not sufficient to support this conviction.

Asaeli, 150 Wn. App. 569-70.

Unlike in *Asaeli*, direct and circumstantial evidence support the jury's finding that—far beyond his mere presence at the scene—Hopson *aided* Suarez's attempt to commit robbery. Cleary testified that he picked up Suarez and Hopson in order for them to sell Oxycontin to Patchell. But police did not find this drug at either the crime scene or on Hopson and Suarez after the shootout. Beyond *Asaeli*'s discussions among co-defendants, the evidence supports that Hopson knew, prior to arriving, that Suarez intended to take Patchell's money without providing Oxycontin in exchange.

Hopson's placement at the scene further distinguishes this case from *Asaeli*. Here, Hopson entered the house and positioned himself near the door. When Suarez barged into the house armed with an assault rifle, Hopson used his position to prevent Patchell from shutting the door. Beyond Hopson's unwittingly accompanying Suarez to the crime scene, any rational trier of fact could find that Hopson was "ready to assist." CP (Hopson) at 83.

Circumstantial evidence also supports a reasonable inference that Hopson actively aided Suarez. Following Suarez's and Hopson's blood trail, police found two guns: an assault rifle and a .45 caliber pistol. Despite both guns being operational, forensics confirmed that only the .45 caliber pistol had been fired. Because Suarez's prints were found on the rifle, any reasonable trier of fact could infer that Hopson possessed and fired the pistol—actions far exceeding mere presence at a crime scene.

Competing evidence was presented at trial: Laster-Cobb and Patchell both testified that

they never saw Hopson holding or shooting a gun while Cleary testified that Hopson participated in the shooting. But competing evidence does not undermine the quantity or sufficiency of evidence. "'Where there is any evidence, however slight, and the evidence is conflicting or is such that reasonable minds may draw different conclusions therefrom, the question is for the jury.'" *State v. Hunter*, 3 Wn. App. 552, 554, 475 P.2d 892 (1970) (quoting *State v. Reynolds*, 51 Wn.2d 830, 834, 322 P.2d 356 (1958)). Viewed in a light most favorable to the jury's verdict, the evidence is sufficient to support Hopson's conviction.

Admissibility of Suarez's Statements

Suarez next contends that the trial court erred in admitting his custodial statements to police at trial. Specifically, he argues that because he "had recently been shot, lost a large amount of blood, nearly died, undergone a twenty-hour long surgery, and was being kept isolated from the comfort of family and friends, he was in a vulnerable and abnormal state" and could not knowingly and intelligently waive his *Miranda* rights. Br. of Appellant Suarez at 22. Because substantial evidence in the record supports the trial court's conclusion[7] that Suarez knowingly and intelligently waived his *Miranda* rights, we disagree.

We review the validity of a *Miranda* rights waiver de novo and will not disturb a trial court's voluntariness determination "if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence."

[7] Normally, a trial court's "findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged and, if challenged, they are verities if supported by substantial evidence in the record." *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Although Suarez does not challenge the trial court's findings of fact in his brief, the State concedes that "Suarez cannot be faulted for failing to assign error to specific findings since the court's findings were not available when his brief was filed." Br. of Resp't at 10.

State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). As the Washington Supreme Court explained in *Aten*,

> Under [*Miranda*], a confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights. To be voluntary for due process purposes, the voluntariness of a confession is determined from a totality of the circumstances under which it was made.

130 Wn.2d at 663-64 (footnotes omitted). This examination includes considerations of the location, length, and continuity of the interrogation; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of the defendant's Fifth Amendment rights. *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). If police tactics manipulated or prevented a defendant from making a rational, independent decision about giving a statement, the statement is inadmissible. *Unga*, 165 Wn.2d at 102.

Here, Tacoma Police Officer Dustin Myhre testified at a pretrial CrR 3.5 hearing that he guarded Suarez at Harborview Hospital three days after the shooting. When Myhre first arrived on his shift, he immediately read Suarez his *Miranda* rights from an "advisement of rights" form. 2 RP at 86. Suarez acknowledged that he understood his rights, but he was "unable" to sign the form at that time. 2 RP at 91. Although Myhre did not ask medical staff about Suarez's condition, he was aware that Suarez had been shot. At the CrR 3.5 hearing, Myhre indicated that Suarez was cooperative, that he never asked Myhre to stop their interview, and that Suarez did not request an attorney. During the interview, Suarez did not relate how he was shot, but he did tell Myhre that he had gone to 702 S. Huson to "buy some pills and pot." 2 RP at 90.

Tacoma Police Detective Robert Yerbury also interviewed Suarez at Harborview about four hours after Officer Myhre interviewed Suarez. Yerbury testified at the CrR 3.5 hearing that

upon his arrival at the hospital, Yerbury "made a verbal assessment with hospital staff, with nursing staff" because he "wanted to be sure that [Suarez] was alert" and "able to understand" the situation. 2 RP at 100-01. Nursing staff assured Yerbury that Suarez was alert and able to speak with him and, following this, Yerbury advised Suarez again of his *Miranda* rights before interviewing him. At the CrR 3.5 hearing, Yerbury testified that Suarez voluntarily waived his rights and that he spoke with Yerbury for approximately a half hour. At no point during this discussion did Suarez ask that the interview end or that he be provided an attorney. Yerbury could not recall whether Suarez implicated himself in any criminal activity during the interview, but he remembered that Suarez admitted being present at the shooting.

Tacoma Police Officer Joseph Harris also testified at the CrR 3.5 hearing and related that Suarez asked to speak with him about the incident the day after Detective Yerbury and Officer Myhre had spoken to him. Harris immediately read Suarez his *Miranda* rights from a department-issued rights card and Suarez acknowledged that he understood his rights. Harris testified that Suarez "was communicating quite well, very effectively given his state." 2 RP at 76. At no time during the approximately 25 minutes that Harris and Suarez discussed the incident did Suarez indicate that he wanted to end the interview or have an attorney present. Harris did not ask medical staff about Suarez's condition.

At the conclusion of the CrR 3.5 hearing, the trial court ruled that all of Suarez's statements would be admissible at trial. Specifically, the trial court ruled that

> [d]efense counsel argues that the defendant was in critical, if not serious condition. However, in reviewing the evidence, there was no evidence to support this. Although there was some evidence that defendant Suarez had undergone some type of surgery, there was no evidence indicating when that surgery was and what surgery was performed. The Court is left to speculate beyond that. Counsel also argued that defendant Suarez was heavily medicated. Again there is no evidence

to support that contention.

2 RP at 149.

Suarez does not contend that police failed to advise him of his *Miranda* rights or that they coerced or manipulated him in an effort to obtain a confession. Nor does he contend that he lacked the maturity, education, or mental competency to waive voluntarily his right to silence or to have an attorney present during questioning. Instead, Suarez asserts that "[a]nyone who has ever had a serious surgery would recognize the woozy and susceptible state a person remains in for several days following the event" and that "Mr. Suarez's vulnerable, stressed condition was heightened by the police guard which isolated Mr. Suarez and prevented him from obtaining any comfort or relief from his family or friends." Br. of Appellant Suarez at 25.

But Washington courts have held that defendants voluntarily waived their *Miranda* rights in far more dire circumstances. In *State v. Cuzzetto*, 76 Wn.2d 378, 378-79, 457 P.2d 204 (1969), for instance, the defendant was thrown from a speeding vehicle while travelling an estimated 60 to 80 mph. The defendant, who was intoxicated, sustained "two broken and some cracked ribs, a leg injury (which did not prevent his walking), two big lumps on his head, and, naturally, a severe shock." *Cuzzetto*, 76 Wn.2d at 379. Officers arrived at the scene shortly after the accident and advised the defendant of his rights. *Cuzzetto*, 76 Wn.2d at 380-81. After waiving his rights, the defendant told officers he was driving the car during the accident. *Cuzzetto*, 76 Wn.2d at 381. At a pretrial voluntariness hearing, the trial court determined that the defendant's confessions were admissible. *Cuzzetto*, 76 Wn.2d at 381.

In *Cuzzetto*, our Supreme Court examined a number of cases from other jurisdictions where appellate courts held that a defendant did not voluntarily waive his or her rights: *Logner v.*

North Carolina, 260 F. Supp. 970 (M.D.N.C. 1966); *State v. Williams*, 208 So. 2d 172 (Miss. 1968); *Warren v. State*, 44 Ala. App. 221, 205 So. 2d 916 (1967), *review denied*, 281 Ala. 725 (1968); *Vandegriff v. State*, 219 Tenn. 302, 409 S.W.2d 370 (1966). In conclusion, the *Cuzzetto* court held that "[t]he appellant's condition at the time he made the statements relied on by the state was not comparable to that of the helplessly drunken Logner; the near hysterical babbling, maudlin Williams; the border line mental defective Warren whose intoxication amounted to mania; or the severely injured and dazed Vandegriff, suffering from a concussion and awaiting emergency attention at a hospital." 76 Wn.2d at 386-87.

More recently, in *Aten*, 130 Wn.2d at 664, the court held that a defendant voluntarily waived her *Miranda* rights despite being administered Librax six hours before speaking with police—an anti-anxiety medication that has confusion and drowsiness as possible side effects. Also, Division Three of this court recently quoted *United States v. George*, 987 F.2d 1428, 1430 (9th Cir. 1993), with approval for the proposition that a "suspect can 'voluntarily waive his *Miranda* rights even when he is in the hospital, on medication, and in pain.'" *State v. Butler*, 165 Wn. App. 820, 828, 269 P.3d 315 (2012).

Because Suarez failed to rebut the officers' testimony at the CrR 3.5 hearing that he voluntarily spoke with them or that the medications he was taking after surgery in any way affected his judgment or ability to voluntarily waive his *Miranda* rights, we hold that substantial evidence in the record supports the trial court's ruling that Suarez's statements were admissible.

Suarez's Baseline Sentence

Suarez contends, and the State concedes, that the trial court erred in imposing consecutive sentences on the two underlying convictions and for sentencing him to the standard range for

attempted first degree robbery without accounting for the anticipatory nature of the offense.[8]

"In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Here, the trial court erred twice in sentencing Suarez.[9]

First, Suarez's convictions for first degree assault and attempted first degree robbery should run concurrently. RCW 9.94A.589 governs whether convictions should run consecutively or concurrently. Although first degree assault is a "serious violent felony" for purposes of sentencing, first degree attempted robbery is not. RCW 9.94A.030(45). Accordingly, the provisions of RCW 9.94A.589(1)(b) are inapplicable to Suarez's case. Instead, RCW 9.94A.589(1)(a) governs and requires that Suarez's sentences run concurrently. The trial court, however, clearly ran Suarez's sentences consecutively when it ordered total confinement of 282 months (132 months for assault plus 54 months for attempted robbery plus 96 months for firearm enhancements).

Second, the trial court erred in failing to account for the anticipatory nature of Suarez's attempted robbery conviction. RCW 9.94A.595 dictates that, in the case of anticipatory offenses, the standard range is determined by multiplying the presumptive sentencing range for the offense attempted by 75 percent. Here, that would reduce the standard range for Suarez's attempted first degree robbery conviction from 41 to 54 months to 30.75 to 40.5 months. In light of these errors, we vacate Suarez's baseline sentence and remand for correction of this error.

[8] Suarez challenges this issue in his SAG as well.

[9] Our review of the record indicates that the trial court correctly calculated Hopson's baseline sentence.

SAG Issues

A. Suarez's Indictment

In his SAG, Suarez argues that we must reverse his first degree assault conviction because he "was convicted of a crime that was not defined in his initial indictment/information." SAG at 1. Specifically, Suarez argues that Washington's criminal code does not define "assault" and, instead, the legislature "has allowed the Judiciary branch to define the core meaning of the crime." SAG at 1.

Essentially, Suarez argues that the judiciary has violated the separation of powers doctrine by defining assault in the absence of the legislature providing its own definition. But Suarez fails to explain how this involves "the activity of one branch threaten[ing] the independence or integrity or invad[ing] the prerogatives of another" branch of government. *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). Furthermore, Washington courts have consistently held that "'[b]ecause an assault is commonly understood as an intentional act,' a mere allegation of assault does not, by definition, omit the element of intent." *State v. Taylor*, 140 Wn.2d 229, 238, 996 P.2d 571 (2000) (quoting *State v. Chaten*, 84 Wn. App. 85, 87, 925 P.2d 631 (1996)). Accordingly, this argument fails.

B. Ineffective Assistance of Counsel

Suarez also contends in his SAG that he received ineffective assistance of counsel. Specifically, he alleges that his "attorney remained seated lethargically & oblivious to the prejudice that was occurring" when Cleary gave inconsistent testimony at trial. SAG at 6.

Suarez also contends that his "counsel's numerous deficiencies amount to cumulative prejudice." SAG at 12.

To prevail on his ineffective assistance of counsel claim, Suarez must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To rebut this presumption, a defendant bears the burden of establishing the absence of any "'conceivable legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Thomas*, 109 Wn.2d at 226 (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694).

Because our independent review of the record reveals that Suarez's counsel actively participated in the trial—including extensive efforts to impeach Cleary and emphasize his credibility problems—and that his performance did not fall below an objective standard of reasonableness, we hold that this claim lacks merit. *Strickland*, 466 U.S. at 687.

Suarez also asserts that he suffered cumulative prejudice because his counsel (1) failed to request a separate trial from a co-defendant, (2) "failed to file a motion in limine to impeach a witness with prior criminal history," (3) failed to "request a [11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 5.06, at 174 (3d ed., 2008)] Jury Instruction of Prior-Conviction-Impeachment of Witness,"[10] and (4) "failed to acquire the medical records when appellant was at hospital being interviewed while heavily medicated." SAG at 12. Suarez provides no argument as to how or why these other alleged deficiencies from counsel prejudiced him. Accordingly, we do not consider these contentions. RAP 10.10(c) ("Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors."). Because counsel's performance was well within an objective standard of reasonableness and Suarez failed to show prejudice, we hold that Suarez received the effective assistance of counsel.

Suarez's and Hopson's Deadly Weapon Enhancements

Appellate counsel for both Suarez and Hopson failed to recognize that the jury's special verdict findings supported a deadly weapon rather than a firearm enhancement. Nevertheless, we raised this issue sua sponte at oral argument in the interest of justice. Because a trial court is bound by the jury's specific findings, we vacate Suarez's and Hopson's sentences and remand for resentencing.

[10] The record reflects that the trial court did provide a jury instruction concerning the past criminal history of witnesses. CP (Suarez) at 49.

Suarez's and Hopson's first degree assault and attempted first degree robbery convictions were subject to potential firearm enhancements of 96 months or, alternatively, deadly weapon enhancements of 36 months. RCW 9.94A.533(3)(a)-(b), (4)(a)-(b). "When the term 'sentence enhancement' describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an 'element' of a greater offense than the one covered by the jury's guilty verdict." *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). Thus, "under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict." *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).

In *Williams-Walker*, our Supreme Court consolidated three cases where, at trial, the prosecution charged firearm enhancements in the information, but the special verdict form given to the jury asked only whether "the defendant [was] armed with a *deadly weapon*." 167 Wn.2d at 893. At sentencing, all three trial courts had added firearm enhancements to the defendants' sentences based on the juries' deadly weapon findings. *Williams-Walker*, 167 Wn.2d at 893. Our Supreme Court held that

> [w]here a jury finds by special verdict that a defendant used a "deadly weapon" in committing the crime (even if that weapon was a firearm), this finding signals the trial judge that only a . . . "deadly weapon" enhancement is authorized, not the more severe . . . firearm enhancement. When the jury makes a finding on the lesser enhancement, the sentencing judge is bound by the jury's determination.

Williams-Walker, 167 Wn.2d at 898.

Here, the amended information charged Suarez and Hopson with use of "a firearm or deadly weapon." CP (Suarez) at 16-17; CP (Hopson) at 18-19. The information also noted the statutory definition for firearm and invoked RCW 9.94A.533, generally—without specifying

subsection (3), firearms, or subsection (4), deadly weapons. Jury instruction 27 provided,

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I and/or Count II.
>
> A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the firearm at the time of the crime.
>
> If one participant to a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one deadly firearm is involved.

CP (Hopson) at 70.

But the special verdict form asked the jury if the defendants were "armed with a *deadly weapon* at the time of the commission of the crime" without reference to firearms. CP (Suarez) at 19, 21 (emphasis added); CP (Hopson) at 104, 106 (emphasis added). The jury found beyond a reasonable doubt that Suarez and Hopson used a deadly weapon to commit first degree assault and attempted first degree robbery. On this basis, the sentencing court erroneously added 96-month *firearm* enhancements to both Suarez's and Hopson's sentences.

Neither the State's charges nor the trial court's jury instructions can rewrite the jury's special verdict finding of "armed with a deadly weapon" to include firearms. This deadly weapon finding cannot be the basis for firearm enhancements at sentencing. Because the jury's findings support deadly weapon, but not firearm, sentence enhancements and because the sentencing court erred in calculating Suarez's sentence, we vacate Suarez's and Hopson's sentences and remand for resentencing.

We affirm Suarez's and Hopson's convictions, vacate their sentences, and 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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

WORSWICK, C.J.