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NO. 93386-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LORENZO STEWART,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY

Petitioner Stewart has filed a petition for review and the State of Washington files this answer.

B. STATEMENT OF RELIEF SOUGHT

The State of Washington respectfully argues that review is not required under RAP 13.4(b)(1) or (3) because there is no conflict in decisions, nor is there a constitutional issue presented.

C. FACTS RELEVANT TO MOTION

Stewart was observed putting a number of bulky items into his cart at Home Depot and then pushing his cart directly to the returns counter. 3RP 63. Stewart misrepresented the items as having been previously purchased and was given a Home Depot store credit card in the amount of $290.05. 3RP 42-45. When Stewart began to leave he was approached by loss prevention officer Joshua Miller, who asked Stewart to come with him to the office. 3RP 64. Stewart threw his hands up and said, "Don't touch me, I can walk on my own." 3RP 64-65. When Stewart tried to move toward the exit Miller positioned his body to prevent him from leaving. 3RP 65. Stewart said, "I'm-a cut you, damn it," and Miller heard a "flick" and instinctively threw his body backward just as a knife blade passed within five or six inches of his face. 3RP 66. Stewart fled the store. Id.

Miller immediately called 911, which began this way:

> OPERATOR: 911, what are you reporting?
> MALE VOICE: My name's Joshua Miller, I'm an asset protection specialist at the Home Depot. **I just had a shoplifter pull a knife on me**.

3RP 70; Ex. 3 (emphasis added). Miller described the knife as "the length of my hand folded, so probably about four and a half, five inches." 3RP 71; Ex. 3. Miller testified that he had never seen the knife in the folded state, but that because of the "flick noise it made" he assumed it was a folding knife, and in talking to the 911 operator he used the length of the blade he had seen to estimate the knife's size. 3RP 86, 91-92. Miller reported that Stewart had left on foot and gave his direction of travel. 3RP 70-71.

Edmonds Patrol Officer Bikar saw Stewart walking nearby on Aurora Avenue. 4RP 12. Officer Strum heard Bikar's broadcast and got to the location in time to see Stewart facing Bikar before Stewart turned away and fled. Id. Before Stewart turned and ran, Strum saw a silver clip in his left front pocket. 4RP 13. Strum believed it to be a knife. Id. Stewart ran through an industrial park and across a grassy field before he was caught by Bikar and Strum. 4RP 13-17. The officers frisked Stewart and he did not have a knife. 4RP 18. A police dog, Hobbs, was used to backtrack across the grassy field and through the industrial park. 4RP

35-36. Hobbs found the knife in the industrial park and indicated that the scent on the knife was associated with Stewart. 4RP 36-37.

Miller positively identified Stewart when he was brought to the arrest scene in the back of a police car. 3RP 25-26, 85-86. As the car drove past, Stewart saw Miller in the back seat and yelled, "that's the asshole that tried to stop me." 3RP 19. An officer asked Stewart why he had pulled a knife on the Home Depot clerk. 3RP 27. The officer carefully quoted Stewart's response:

> I carry a knife every day, it is my God given right to carry a knife. That man had no right to put his hands on me. If I would have slashed a knife at that man, you wouldn't have been able to talk to him.

3RP 27-28.

The recovered knife is a spring-assisted knife, which is illegal to possess, and is also known as a switchblade. 3RP 100. The knife has a silver clip that hooks onto a pocket. 3RP 101; Ex. 1. The blade of the knife is approximately four inches long. 3RP 102; Ex. 12, Ex. 13. Although there was evidence of fingerprints on the knife, none of the prints were of comparison value. 3RP 113-15. Stewart did not testify and the defense called no witnesses.

The jury convicted Stewart of robbery in the first degree, and also returned a special verdict finding that he had been armed with a deadly weapon at the time of the commission of the crime. CP 16-17.

Stewart argued on appeal that (1) the jury was improperly instructed on an uncharged alternative means of committing the crime, (2) the trial court's instructions relieved the State of its burden of proof regarding the deadly weapon enhancement, and (3) he received ineffective assistance of counsel for his attorney's failure to propose a jury instruction providing the definition of "armed." In an unpublished opinion, the court of appeals affirmed the conviction and sentence enhancement, holding that the information adequately notified Stewart he would face charges of being "armed" with a deadly weapon, there was no instructional error, and that Stewart failed to establish ineffective assistance of counsel. State v. Stewart, No. 73163-7-I, slip op. at 1 (filed 4/25/16).

D. ARGUMENT

1. THE COURT OF APPEALS HOLDING THAT UNDER THE FACTS OF THE CASE STEWART HAD ADEQUATE NOTICE THAT HE MUST DEFEND AGAINST A CHARGE OF FIRST DEGREE ROBBERY WHILE ARMED WITH A DEADLY WEAPON DOES NOT CONFLICT WITH BROCKIE.

Stewart argues that his conviction for robbery in the first degree must be reversed because the jury was instructed on an uncharged

alternative means of committing the crime. He claims that the court of appeals rejection of his claim is in conflict with this Court's decision in State v. Brockie, 178 Wn.2d 532, 309 P.3d 498 (2013). Stewart is wrong. The error in Brockie, that the defendant was not provided notice that he was armed with a deadly weapon, did not occur in this case; Stewart had notice that he was accused of being armed with a knife.

The Sixth Amendment of the United States Constitution and article I, section 22 of our state constitution require that charging documents include all essential statutory and nonstatutory elements of a crime. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). The purpose of the requirement is to give notice to the accused of the nature of the crime in order to prepare a defense. State v. Tandecki, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005). It is not necessary to use the exact words of the statute if other words are used which equivalently or more extensively signify the words in the statute. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989) (citing State v. Knowlton, 11 Wn. 512, 39 P. 966 (1895)).

In Brockie, the defendant was charged with robbery in the first degree by an information that alleged that he "displayed" what appeared to be a deadly weapon, but did not allege that he was "armed with" a deadly weapon. Brockie, at 535. However, the jury instructions allowed

conviction on either alternative means for first degree robbery: "A person commits the crime of robbery in the first degree when in the commission of a robbery he or she *is armed with a deadly weapon or* displays what appears to be a firearm or other deadly weapon." Brockie, at 535 (emphasis in original).

In a personal restraint petition, Brockie alleged that it was reversible error to instruct on the uncharged alternative means. This Court found instructional error, but did not reverse Brockie's convictions because he had failed to prove actual and substantial prejudice. Brockie, at 540. Fundamental to this Court's holding was that Brockie never received notice that he would have to defend against an allegation that he had been "armed."

> By specifying the means of displaying what appeared to be a firearm or other deadly weapon, the charging information limited **Brockie's** notice to that particular means. Nothing in the charging information put **Brockie** on notice that he might be charged with the alternative means of first degree robbery while armed with a deadly weapon.

Brockie, at 538.

The amended information here provided as follows:

> That the defendant Lorenzo Stewart in King County, Washington, on or about August 27, 2014, did unlawfully and with intent to commit theft take personal property of another, to wit: U.S. currency (store credit), from the person and in the presence of Joshua Paul Miller, against his will, by the use or threatened use of immediate

> force, violence and fear of injury to such person or his property and to the person or property of another, and in the commission of and in immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon, to-wit: a knife; ...
>
> **And further do accuse the defendant, Lorenzo Stewart at said time of being armed with a deadly weapon, to-wit: a knife.**

Supp. CP ____, Sub #70 (statutory citations omitted, emphasis added). Here, the charging document alleged that Stewart was both armed with a knife and displayed a knife. Stewart was plainly on notice that the State was alleging that he was "armed."

The court of appeals held that, under the circumstances of this case, Stewart was not prejudiced:

> [A] charging document need not use the exact words of the statute if it uses words conveying the same meaning that give reasonable notice to the defendant of the charge. In re Pers. Restraint of Benavidez, 160 Wn. App. 165, 170, 246 P.3d 842 (2011). Here, the sentencing enhancement allegation for the robbery charge accused Stewart "of being armed with a deadly weapon" at the time he committed the robbery. Read together, the robbery charge and related sentencing enhancement allegation gave Stewart notice that he should expect to defend against the charges of "displaying" and being "armed" with a deadly weapon. Thus, the discrepancy between the charging information and the to convict instruction did not prejudice him. It was not reversible error.

Slip. Opinion at 7 (emphasis in original).

Here, the State concedes that Stewart was found guilty based on the only means on which the jury was instructed, that Stewart was armed

with a deadly weapon, a knife. However, under the specific facts of this case, wherein the language of one of the alternative means of committing robbery in the first degree, that the defendant was armed with a deadly weapon, mirrors the language of the charged deadly weapon sentence enhancement, Brockie does not apply. Because Stewart had notice that he had to defend against a charge that he was armed with a deadly weapon, any error was harmless.

For these reasons, the court of appeals decision was correct and Brockie is not controlling, so there is no conflict necessitating review under RAP 13.4(b)(1).

2. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE TRIAL COURT GAVE THE CORRECT SPECIAL VERDICT DEADLY WEAPON INSTRUCTION WHEN THE ONLY WEAPON AT ISSUE WAS A DEADLY WEAPON AS A MATTER OF LAW.

Stewart claims that the court of appeals erred by upholding his 24-month deadly weapon sentence enhancement. He claims the weapon enhancement should be vacated because the trial court failed to properly instruct the jury on the definition of a deadly weapon for the purposes of the special verdict. Stewart's argument should be rejected for two reasons. First, at trial Stewart did not object to the instruction he now complains of, and, therefore, pursuant to RAP 2.5, his claim should not be

addressed on appeal. Second, as the court of appeals correctly held, there was no error in the instruction defining deadly weapon for purposes of the special verdict. The trial court gave the modified version of WPIC 2.07.01 that is recommended when the weapon is a knife with a blade over three inches in length, a per se deadly weapon.

Appellate courts generally will not consider an issue that is raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. The purpose behind this rule is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. Stewart does not even acknowledge that he failed to object to the instruction at trial, and he makes no attempt to meet his burden to show that the alleged error was constitutional and manifest. Under such circumstances, a reviewing court should refuse even to address the matter. See State v. Lindsey, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

This Court has denied appellate review in circumstances virtually identical to the case at bar. In State v. Eckenrode, 159 Wn.2d 488, 150 P.3d 1116 (2006), the defendant was convicted of drug charges with

special verdicts for having been armed with a firearm at the time of the commission of the offenses. For the first time on appeal, Eckenrode alleged that the jury instruction defining deadly weapon for the special verdict did not include nexus language. This Court held:

> But we have not vacated sentencing enhancements merely because a jury was not instructed that there had to be such a nexus. There is another principle that bears on our review: whether any alleged instructional error could have been cured at trial. We have found that the defendant's failure to ask for the nexus instruction generally bars relief on review on the ground of instructional error. *See, e.g., State v. Willis,* 153 Wn.2d 366, 374, 103 P.3d 1213 (2005).

Eckenrode, 159 Wn.2d at 491. The Eckenrode court then limited its review to the sufficiency of the evidence. Stewart's claim was similarly not preserved. The court of appeals should never have addressed his claim for the first time on appeal.

In any event, the court of appeals holding on the merits of Stewart's argument was correct. The instruction given was the standard WPIC 2.07.01, with the bracketed material of the instruction used appropriately considering the evidence presented at trial. The only knife admitted into evidence, or even mentioned in the case, had a four-inch blade, a per se deadly weapon.

The statutory definition of a deadly weapon for purposes of a special verdict provides:

> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: . . . any knife having a blade longer than three inches . . . .

RCW 9.94A.825.

The full text of WPIC 2.07.01 states:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime [in Count].
>
> [A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon 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 weapon and the defendant [or an accomplice]. The State must also prove beyond a reasonable doubt that there was a connection between the weapon 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 weapon at the time of the crime][the type of weapon] [(fill in other relevant circumstances)].]
>
> [If one participant in a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.]
>
> [A knife having a blade longer than three inches is a deadly weapon.][A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.]

The notes on use of the instruction direct: "Do not use the second paragraph in a case in which the weapon was actually used and displayed during the commission of the crime." Further, the comment to WPIC 2.07.01 instructs that when the weapon in question is one listed among the statutorily defined deadly weapons in RCW 9.95.040 (as is a knife with a blade longer than three inches), "the prefatory 'likely to produce death' language found in WPIC 2.07 should be omitted and that the jury should be instructed the implement is a deadly weapon as a matter of law." These instructions on use are consistent with State v. Rahier, 37 Wn. App. 571, 576, 681 P.2d 1299 (1984).

Here, consistent with the accepted usage of WPIC 2.07.01, and Rahier, the jury was instructed as follows:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime.
>
> A knife having a blade longer than three inches is a deadly weapon.

CP 40.

Stewart argues that based on this instruction jurors could have convicted him of the sentencing enhancement without finding the knife had a blade longer than three inches and without finding that the knife was used in a manner likely to produce death. Stewart's argument that the jury

instruction should have included "manner of use" language depends on utter speculation, not on the evidence in this case.

Here, because the only weapon the jury heard about during the trial was a knife with a four-inch blade, and as a matter of law a knife with a blade longer than three inches is a deadly weapon for purposes of the special verdict, there was no reason to instruct the jury on the generic special verdict definition that "a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." It is clear that the State alleged that the weapon used was the switchblade knife with a four-inch blade that was admitted into evidence. The switchblade knife admitted into evidence was consistent in size and type with the knife the victim Miller heard make the "flick" noise. The recovered knife had a distinctive silver clip, consistent with Officer Strum's observation of the knife clipped to Stewart's pocket only minutes before his arrest. The knife was found along the path that Stewart had run minutes before. The police dog indicated that the knife was associated with the scent he had been given.

Under the evidence in this case, the court of appeals properly rejected Stewart's argument and upheld the instruction:

> [T]he overwhelming evidence established that Stewart brandished a four-inch knife at Miller. If the jury concluded Stewart had a knife at the time of the robbery, it necessarily had to conclude the knife was longer than three inches based on the trial evidence.
>
> Any knife with a blade longer than three inches is a deadly weapon as a matter of law. When the State alleges that the defendant used a per se deadly weapon, "[t]he jury should be instructed the implement is a deadly weapon as a matter of law."[1] The instruction does not, as Stewart contends, merely provide an example of a deadly weapon. We conclude the trial court did not err by instructing the jury that the knife was a per se deadly weapon.

Slip op. at 11.

The defense presented no testimony or evidence in this case. It was not an abuse of discretion for the trial court to give the modified version of WPIC 2.07.01 that is recommended when the weapon is a knife with a blade over three inches in length, a per se deadly weapon.

3. THE COURT OF APPEALS CORRECTLY REJECTED STEWART'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show deficient performance, he must show that his counsel's performance fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239

[1] The court of appeals quoted State v. Rahier, 37 Wn. App. at 576.

(1997). In judging the performance of trial counsel, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

To prevail on an ineffective assistance of counsel claim for failure to propose a jury instruction, Stewart must establish that (1) the trial court likely would have given the proposed instruction had it been requested, and (2) defense counsel's failure to request the instruction was not a legitimate tactical decision. State v. Powell, 150 Wn. App. 139, 154-55, 206 P.3d 703 (2009). Here, Stewart cannot prove the trial court would have given an instruction defining "armed" for the purpose of the special verdict. A defendant is only entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory. Powell, 150 Wn. App. at 154 (citing State v. Washington, 36 Wn. App. 792, 793, 677 P.2d 786 (1984)).

This Court has held that a person is "armed" as a matter of law if "a weapon is easily accessible and readily available for use, either for offensive or defensive purposes," and a nexus exists between the defendant, the weapon, and the crime. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). However, jury instructions need not contain "nexus" language. State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005).

Here, the court of appeals correctly held that there was not substantial evidence in the record to support a nexus instruction had Stewart requested it. Slip op. at 14. The court of appeals properly rejected Stewart's argument that his statement to the police encompassed a denial of pulling or using the knife. Slip op. at 13. The court found that, based on Miller's unrebutted testimony, "overwhelming evidence supports the conclusion that Stewart did not merely possess the knife but used it during the robbery." Slip op. at 13. The court also properly held that based on the evidence Stewart cannot show that had his attorney asked for the instruction the outcome would have been different. Slip Op. at 14.

The court of appeals did not err in rejecting Stewart's ineffective assistance of counsel claim.

DATED this 15 day of November, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
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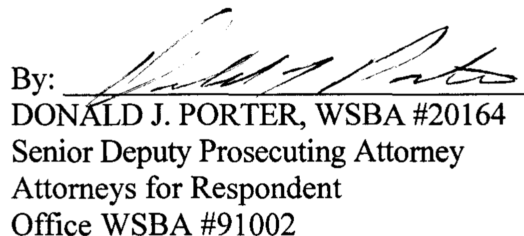
By: 
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Done in Seattle, Washington

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