IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 34032-5-III

STATE OF WASHINGTON, Respondent,

v.

EDWARD LEON NELSON, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Edward Leon Nelson requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on May 2, 2017 and amended on June 6, 2017, affirming Leon's conviction for attempted first degree robbery with a firearm enhancement. A copy of the Court of Appeals' unpublished opinion is attached hereto as Appendix A, and its order granting reconsideration and amending the opinion are attached hereto as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

Nelson contended below that (1) the trial court failed to instruct the jury on all the essential elements of the crime, pursuant to *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015); (2) insufficient evidence supported the firearm enhancement when the State did not prove it was operable, and the jury's verdict on the enhancement conflicted with its subsequent acquittal of Nelson for unlawfully possessing a firearm in a bifurcated trial; (3) the trial court should have given his requested lesser-included offense instruction on the crime of unlawful display of a firearm;

and (4) in a Statement of Additional Grounds, that a 17-month delay in bringing him to trial violated his speedy trial rights. The Court of Appeals agreed that the jury instructions did not comport with *Richie* but found the error harmless beyond a reasonable doubt, and rejected his remaining arguments. Nelson now seeks review of the Court of Appeals' rulings on these four issues:

(1) Whether the trial court's "to convict" instruction harmfully eliminated an essential element of the charge, relieving the State of its burden of proof;

(2) Whether the firearm enhancement should be vacated when it was not shown to be a real gun, and the jury subsequently acquitted Nelson of unlawfully possessing a firearm;

(3) Whether the trial court deprived Nelson of a defense when it declined to give his instruction on the lesser-included offense of unlawful display of a firearm; and

(4) Whether the 17-month pretrial delay deprived Nelson of his constitutional right to a speedy trial.

IV. STATEMENT OF THE CASE

On a summer afternoon, a man later identified as Nelson entered a Rite-Aid pharmacy and demanded medication from a pharmacy tech, gesturing to what looked like a large black gun he was holding and saying the tech better get him what he wanted or he would shoot her in ten seconds. III RP 46-48, 50, 52, 54, 84, 291, 299-300. Only the pharmacist on shift had access to the medication he asked for, which was stored in a locked box where even the store manager could not get to it. III RP 52, 78, 80, V RP 335-36, 340. Accordingly, the tech directed the man to the pharmacist, who declined to provide the medication. III RP 52. The man then demanded cash, and the pharmacist said he did not have access to it and paged the manager to the pharmacy. III RP 53. At that point, the man turned and left. III RP 53, 112. At no time did he display the gun or threaten violence against the pharmacist, who only found out later the man had shown the gun to the pharmacy tech. III RP 52, 75, 80, 97.

The State charged Nelson with attempted first degree robbery with a firearm enhancement as well as unlawfully possessing a firearm, due to his prior felony convictions. CP 31-32. Nelson's trial counsel proposed several jury instructions pursuant to *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015), incorporating the element that the person threatened must have an ownership, representative, or possessory interest in the

property, and defining a representative interest in the property as having authority to act regarding the property. CP 41-45. The trial court declined the proposed instruction and further prohibited defense counsel from arguing that the pharmacy tech did not have a possessory or representative interest in the medication, even though the evidence was undisputed that she lacked any authority to access or dispense it. IV RP 411, 415-18. Instead, the court instructed the jury that a person with a representative interest included an employee or agent, and in its to convict instruction, only required the jury to find that the pharmacy tech was an employee, not that she had the requisite interest in the medication. CP 66-67.

Nelson also requested an instruction on the lesser-included offense of unlawfully displaying a firearm. CP 46-47. The court declined to give it. VI RP 427.

At trial, the charge of unlawful possession of a firearm was bifurcated. I RP 27. The jury convicted Nelson of attempted first degree robbery and found the firearm enhancement was committed, but acquitted him following the bifurcated trial for unlawfully possessing a firearm. CP 84-87, 112. In the bifurcated trial, the State's detective witness indicated that no firearm was ever recovered, the make and model of the firearm

could not be ascertained by surveillance video of the incident, and airsoft guns can be confused with real guns. VII RP 507-09.

Nelson was sentenced as a persistent offender to life without the possibility of parole. CP 146-49, 153. In an unpublished opinion, the Court of Appeals agreed that the trial court's *Richie* instructions unconstitutionally relieved the State of its burden of proof as to an essential element of the charge, but found the error harmless. *Opinion,* at 2. The Court of Appeals also held that sufficient circumstantial evidence supported the firearm enhancement based upon "[t]estimony that the gun appeared real, coupled with evidence that the defendant used the gun in committing a crime," and the enhancement verdict was not undermined by the inconsistent acquittal on the charge unlawful possession of a firearm. *Opinion*, at 13. Lastly, the Court of Appeals affirmed the denial of the unlawful display instruction, concluding it was not factually supported. *Opinion*, at 14-15.

In a Statement of Additional Grounds, Nelson argued that his trial counsel was ineffective for repeatedly seeking continuances over his objection. *Statement of Additional Grounds*, attached hereto as Exhibit C. Acknowledging that there was a 17-month pretrial delay, nevertheless the

Court of Appeals held that the delay was not presumptively prejudicial and denied relief. *Opinion*, at 18-19.

Nelson now seeks review of the Court of Appeals' decision as to the issues set forth in Section III.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(3), review will be accepted if a significant question of law under the Constitution of the State of Washington or of the United States is involved, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Both factors are satisfied in the present case as to the issues presented. As to the essential elements of the firearm enhancement, review is also appropriate under RAP 13.4(b)(1) and (2) because the question of the State's burden of proof arises from a conflict between Division III's decision in *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310 (2016), and prior decisions of the Court of Appeals and the Supreme Court.

A. Evaluating the requirements of *Richie* in the case of an attempt crime, and the interplay between the *Richie* requirements and the impossibility doctrine, present constitutional questions as to the State's burden of proof and the ability to present a defense.

In *State v. Richie*, 191 Wn. App. 916, 929, 365 P.3d 770 (2015), the Court of Appeals held that a to-convict instruction for the crime of

robbery must include the implied element that the victim have an ownership, possessory, or representative interest in the property taken. *Richie* relied significantly on this court's decision in *State v. Tvedt*, 153 Wn.2d 705, 714-15, 107 P.3d 728 (2005), acknowledging the necessity of a relationship between the victim and the property, and defining the unit of prosecution for a robbery charge as each separate forcible taking of property from or in the presence of a person having the necessary relationship to the property. In the earliest formulation of this requirement, the court stated as an example:

> For instance, if A. takes the property of B. from the immediate presence of C. by force or putting in fear, A. is not guilty of the crime of robbery unless B. had control and dominion over C.'s property at the time of the taking.

State v. Hall, 54 Wash. 142, 144, 102 P. 888 (1909).

In the context of an attempt, the importance of the relationship between the victim and the property sought to be taken is less clear-cut because of the fact that the crime was not completed, and impossibility is not a legal or factual defense to an attempt crime. *See, e.g., State v. Johnson*, 173 Wn.2d 895, 270 P.3d 591 (2012) (holding that a defendant may be convicted of an attempted child sex crime when the victim is an adult, as long as the defendant believed the victim was underage and intended to commit the crime against a minor); RCW 9A.28.020(2)

(statutorily rejecting impossibility defenses for attempt crimes). Reconciling the *Hall* and *Johnson* formulations, a person who actually takes property from one who is believed to but does not actually possess the requisite relationship with the property, is not guilty of robbery, but may be guilty of attempted robbery. The Court of Appeals ruling in this case expands this formulation by holding that a person who did not take property, nor affect a victim with the requisite relationship, is just as culpable as the defendant who actually takes the property, but from the wrong person. This outcome is highly counter-intuitive.

Reconciling the requirements of *Richie* with the State's lowered burden to prove an attempt is a question of constitutional magnitude concerning the essential elements of attempted robbery. The State has the constitutional burden to prove all of the elements of the charge beyond a reasonable doubt. *Richie*, 191 Wn. App. at 927. Here, while acknowledging that the instructions clearly failed to comply with *Richie*, the Court of Appeals effectively concluded that the jury must necessarily conclude that Nelson's actions constituted a substantial step toward the completed robbery, even though the pharmacy tech had an insufficient relationship to the property and the person who did have access, the pharmacist, was not threatened and did not even know about the threats to the pharmacy tech at the time. *Opinion*, at 11. Evaluating this conclusion

requires examination of the essential elements of attempted robbery in light of *Richie* and *Johnson*. Review is therefore appropriate under RAP 13.4(b)(3).

B. The extent to which the State can prove an essential element of the charge through inference and circumstance raises a constitutional question as to the State's burden of proof and appears to reflect a conflict between divisions of the Court of Appeals.

In *State v. Pam*, 98 Wn.2d 748, 751, 659 P.2d 454 (1983), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989), witnesses identified Pam as a robber carrying a shotgun that fell apart as he fled the scene. The jury was not instructed that it had to find the elements of the deadly weapon and firearm enhancements beyond a reasonable doubt. Observing that a "gun-like object incapable of being fired is not a 'firearm'," the court reversed the special verdicts because "a rational jury could have a reasonable doubt as to the operability of the weapon." *Id.* at 754-55.

Pam recognized that the statutory definition of a "firearm" required some evidence to establish that it was actually capable of firing a projectile by use of an explosive. Notably, *Pam* itself appeared to involve a real shotgun, in that police recovered the wooden forestock. 98 Wn.2d at 751. At issue, then, was not whether the item was originally

manufactured to be able to fire an explosive projectile, but whether it was capable of doing so at the time the crime was committed. *See also State v. Faust*, 93 Wn. App. 373, 967 P.2d 1284 (1998); *State v. Padilla*, 95 Wn. App. 531, 978 P.2d 1113 (1999) (both Divisions One and Two holding that the firearm in question must be operable at the time of the commission of the crime).

This Court has since affirmed that reading of *Pam*, stating, "We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement." *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008). And following *Recuenco*, Division Two of the Court of Appeals agreed, holding that evidence of operability is necessary to uphold a firearm enhancement even when there is no question that the items in question are real, i.e. not toy, guns. *State v. Pierce*, 155 Wn. App. 701, 23 P.3d 237 (2010).

Division Three created a conflict with Division II's ruling in *Pierce* and the Supreme Court's rulings in *Pam* and *Recuenco* when it decided *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310 (2016). In *Tasker*, the Court of Appeals held that the use of something appearing firearm-like to a witness is itself circumstantial evidence that the item is an

operable firearm. *Id.* at 592. Accordingly, the *Tasker* court accepted as sufficient evidence of an operable firearm testimony that the item was used in the course of a robbery and kidnapping, the victim saw the item at close range and was positive it was a gun, the victim was old enough to have seen guns, and the victim heard a clicking noise behind her head that was consistent with the use of a real gun. *Id.* at 595. *Tasker* provided the primary justification for the Court of Appeals' ruling in this case that the State presented sufficient evidence to support the firearm enhancement, notwithstanding the conflicting verdict on the unlawful possession charge. *Opinion*, at 13.

The *Tasker* court's reasoning is problematic in several respects. It serves to reduce the State's burden of proof from the standard established by the statutory definition of a "firearm" and acknowledged in *Pam* and *Recuenco* as a real, operable gun, to proving only that something that looks like a gun was used in the manner that one might use a real gun. This reduction in the State's burden of proof is in direct conflict with the *Pam* Court's express recognition that "a gun-like object incapable of being fired is not a 'firearm'." 98 Wn.2d at 754.

The *Tasker* standard is also troublingly circular, conflating evidence that is sufficient to show probable cause to charge the firearm

enhancement with evidence sufficient to prove the enhancement beyond a reasonable doubt. Certainly a witness's observation and belief that a firearm was used to perpetrate a crime warrants charging the enhancement, but under *Tasker*, the mere use of something gun-like is independent evidence beyond a reasonable doubt that the gun-like thing is a gun. This bootstrapping of facts sufficient to charge into facts sufficient to convict cannot be reconciled with *Pam*'s distinction between items used as guns, and items that actually are guns. Moreover, the standard effectively presumes guilt from the fact of the charge – an enhancement will not be charged without some evidence that a gun-like object is used to further criminal activity, yet under *Tasker*, this evidence is also sufficient to convict.

Lastly, the *Tasker* standard introduces unworkably subjective considerations into the evidentiary standard of proof by creating a heavily fact-dependent evaluation of the witness's age, experience with firearms, and surrounding circumstances. Yet *Tasker* provides no mechanism for distinguishing between cases when circumstantial accounts are sufficient evidence and when they are not. Read to its extreme, *Tasker* could be understood to hold that evidence is sufficient to find an operable firearm anytime a witness claims to see a gun. This would further entrench the divide with Division Two's ruling in *Pierce*, which recognized that

although circumstantial evidence could tend to establish operability, acceptable circumstantial evidence would include bullets found, gunshots heard, or muzzle flashes observed – in other words, evidence that tends to corroborate a witness's observations, not the observations themselves. 155 Wn. App. at 714 n. 11.

In relying exclusively on its *Tasker* decision, the Court of Appeals' decision in this case directly conflicts with the Supreme Court's rulings in *Pam* and *Recuenco*, as well as the decision of Division Two of the Court of Appeals in *Pierce*. Acceptance of review should therefore be granted under RAP 13.4(b)(1) and (2) to resolve the conflict. Moreover, *Tasker* reduces the State's burden of proof as to an essential element and therefore raises a question of constitutional magnitude as to what the essential elements actually are, supporting review under RAP 13.4(b)(3). Because *Tasker* and the present case reflect a substantial departure from the jurisprudence deriving from *Pam* and *Recuenco*, and because the different divisions of the Court of Appeals are governed by sharply different interpretations of what the State is required to prove, this Court should take the opportunity to reevaluate its precedents and announce whether they remain viable and controlling, or expressly overrule them.

C. Whether a 17-month pretrial delay is presumptively prejudicial presents a question of constitutional significance.

The Sixth Amendment to the U.S. Constitution and Article I, Section 22 of the Washington Constitution guarantee the defendant the right to a speedy public trial. *State v. Iniguez*, 167 Wn.2d 276, 281-82, 217 P.3d 768 (2009). Violation of a defendant's constitutional right to a speedy trial requires dismissal of the charges with prejudice. *Id.* at 282 (citing *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972)).

The first inquiry is whether the length of the delay is presumptively prejudicial. *Barker*, 407 U.S. at 530. This inquiry is necessarily dependent on the circumstances of each case. *Id.* at 530-31. Once the delay is determined to be presumptively prejudicial, the court then considers a number of factors to determine if a constitutional violation has occurred. *Iniguez*, 167 Wn.2d at 283.

"The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court," which discretion is abused when the trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Saunders*, 153 Wn. App. 209, 216, 220 P.3d 1238 (2009) (quoting *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). A continuance may be granted

upon a finding that additional time is required in the administration of justice and the defendant will not be substantially prejudiced. *State v. Williams*, 104 Wn. App. 516, 521-22, 17 P.3d 648 (2001). In itself, granting a continuance over a defendant's objection to allow defense counsel more time to prepare for trial is not an abuse of discretion. *Williams*, 104 Wn. App. at 523 (citing *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984)). But courts have acknowledged that continuance requests must be considered in light of counsel's duty to abide by the client's decision as to the objectives of representation. *Saunders*, 153 Wn. App. at 217-18. In *Saunders*, where three continuances were granted over the defendant's objections without an adequate basis or reason articulated, it was an abuse of discretion that required dismissal of the charges under the speedy trial rule. *Id.* at 220-21.

Here, the Court of Appeals concluded that the 17-month pretrial delay was not presumptively prejudicial because of the seriousness of the charge and the potential for a persistent offender sentence. *Opinion*, at 18-19. But the Court did not consider any of the factors unique to the case, such as the reasons for the multiple continuance requests, Nelson's disagreement with the requests, and Nelson's right to determine the outcomes of the representation. The Court also did not consider the consensus across multiple jurisdictions that delays of between eight and

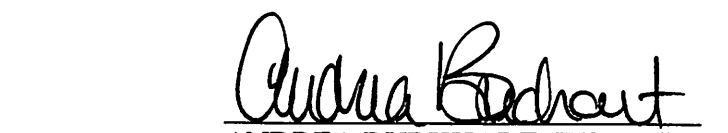
twelve months can be presumed to be prejudicial. *Iniguez*, 167 Wn.2d at 290. Because the delay in this case was more than twice the minimum identified as presumptively prejudicial in *Iniguez*, the Court of Appeals did not apply the correct standard in concluding the 17-month delay here was not presumptively prejudicial.

Appropriately applying the *Barker* factors in cases where pretrial delay is occasioned by defense counsel's requests over the defendant's objection requires reconciliation of the defendant's constitutional rights to a speedy trial and effective assistance of counsel. Such reconciliation amounts to a question of constitutional significance under RAP 13.4(b)(3).

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1), (2) and (3) and this Court should enter a ruling reversing Nelson's conviction and sentence for attempted robbery.

RESPECTFULLY SUBMITTED this 6th day of July, 2017.



ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Edward Leon Nelson, DOC # 939164
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

And, pursuant to prior agreement of the parties, by e-mailing a copy to:

David Trefry
David.Trefry@co.yakima.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 6th day of July, 2017 in Walla Walla, Washington.

Breanna Eng

APPENDIX A

FILED
MAY 2, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 34032-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
EDWARD LEON NELSON,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — A jury found Edward Leon Nelson guilty of attempted first degree robbery with a firearm enhancement and also found him guilty of attempting to elude a pursuing police vehicle. In a bifurcated trial, the jury found Mr. Nelson not guilty of unlawful possession of a firearm in the first degree.

Mr. Nelson appeals his conviction for attempted first degree robbery. He argues: (1) the to-convict instruction omitted the essential nonstatutory element that the victim have a possessory, ownership or representative interest in the property, (2) sufficient evidence does not support his conviction for attempted first degree robbery, (3) the firearm enhancement should be vacated for lack of sufficient evidence and inconsistent verdicts, and (4) the trial court erred in refusing to instruct the jury on the lesser included

offense of unlawful display of a firearm. He also raises three separate arguments in his statement of additional grounds for review (SAG).

We conclude the trial court's to-convict instruction for attempted first degree robbery lacked an essential element and unconstitutionally relieved the State of its burden of proving each element beyond a reasonable doubt. But we also conclude the error was harmless beyond a reasonable doubt. We otherwise reject Mr. Nelson's arguments and affirm his convictions.

FACTS

Background facts

Myung Meinhold was on duty at the pharmacy counter at a Rite Aid store in Yakima, Washington, on August 15, 2014. She noticed Mr. Nelson, who continually would go to the back of the line as customers came and went. Eventually, he came back with a roll of paper towels and handed Ms. Meinhold a note asking for oxycodone. He then lowered his chin and looked down at his hand. Ms. Meinhold followed his gaze and noticed he was holding a black pistol. She testified the pistol was not pointed at her, but was pointed "towards the roof." Report of Proceedings (RP) at 51. He said, "you're going to get this for me or I'm going to shoot you in ten seconds." RP at 52.

Ms. Meinhold told Mr. Nelson she did not have access to the oxycodone and had to get the pharmacist. Ms. Meinhold had the pharmacist, Thomas Newcomer, quickly come to the counter.

Mr. Newcomer glanced at Mr. Nelson's note, and Mr. Nelson asked him for oxy-30s, meaning 30 milligram oxycodone pills. Mr. Newcomer believed the note was some sort of fake prescription. He did not see Mr. Nelson's gun and was not aware that Mr. Nelson even had a gun. He began to walk toward the secured oxycodone, paused, and decided he did not want to supply oxycodone to someone without a valid prescription. He then told Mr. Nelson the store was out of oxycodone.

Mr. Nelson next demanded cash. Only then did Mr. Newcomer realize Mr. Nelson intended to rob the store. Mr. Newcomer said he did not have access to cash, and said he would call the manager. Mr. Nelson immediately fled the store with the paper towels.

The facts leading to Mr. Nelson's arrest are known to the parties and need not be recited because they do not bear on the issues raised on appeal.

Procedural facts

By third amended information, the State charged Mr. Nelson with attempted first degree robbery of Ms. Meinhold and/or Mr. Newcomer, attempting to elude a pursuing police vehicle, and first degree unlawful possession of a firearm. Because the third

charge required introducing evidence of Mr. Nelson's prior convictions, the parties agreed to bifurcate that charge from the first two.

The State presented the evidence recited above to the jury. The State also sought to present a videotaped interview between Mr. Nelson and law enforcement. Mr. Nelson objected. The trial court excused the jury to hear and consider Mr. Nelson's objections. Mr. Nelson objected to several parts of the video and argued those parts were substantially more prejudicial than probative. After careful review of the transcript, the parties agreed to excise certain portions of the interview so that the jury would not see the unduly prejudicial parts of the interview. The trial court admitted the remainder of the videotape without objection.

After the State rested, the trial court asked Mr. Nelson if he had anything to address. Mr. Nelson responded that he did. First, Mr. Nelson moved to dismiss the portion of the attempted first degree robbery charge that listed Mr. Newcomer as a victim. Mr. Nelson argued there was insufficient evidence that Mr. Newcomer was threatened with the use of force. After the State responded, the trial court granted Mr. Nelson's first motion.

Second, Mr. Nelson moved to dismiss the portion of the attempted first degree robbery charge that listed Ms. Meinhold as a victim. Mr. Nelson argued there was

insufficient evidence that Ms. Meinhold had access to the oxycodone. Mr. Nelson, citing *State v. Richie*[1] and *State v. Latham*,[2] also argued there was insufficient evidence Ms. Meinhold had an ownership, representative, or possessory interest in the oxycodone. The State responded, "That might be a good argument if he had been charged with a completed crime, but he's been charged with the attempt. The legal and factual impossibility is not a defense." RP at 404. Mr. Nelson responded that classifying the crime as an attempt does not negate the State's obligation to prove that Ms. Meinhold had a representative interest in the oxycodone. The trial court concluded that Ms. Meinhold's status as an employee was sufficient for her to have a representative interest in the property under *Richie* and denied Mr. Nelson's second motion.

The trial court directed the bailiff to bring the jury back. Once back, Mr. Nelson rested his case.

The parties then discussed jury instructions. Mr. Nelson's proposed to-convict instruction for attempted first degree robbery required the jury to find that Ms. Meinhold had a possessory, ownership, or representative interest in the property sought to be taken. The trial court, consistent with its earlier ruling, rejected that instruction.

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[1] 191 Wn. App. 916, 365 P.3d 770 (2015).

[2] 35 Wn. App. 862, 670 P.2d 689 (1983).

Mr. Nelson also requested the trial court to instruct the jury on a lesser included offense, unlawful display of a firearm. The trial court rejected that instruction, too.

The trial court determined it would give the following to-convict instruction:

> To convict the defendant of the crime of Attempted First Degree Robbery in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 15, 2014, the defendant did an act that was a substantial step towards unlawfully taking personal property from the person or in the presence of another, Myung B. Meinhold;
>
> (2) That Myung B. Meinhold was an employee of the owner of the property;
>
> (3) That the defendant intended to commit theft of the property;
>
> (4) That the attempt to take was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
>
> (5) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking;
>
> (6)(a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon; or
>
> (b) That in the commission of these acts or in the immediate flight therefrom the defendant displaced what appeared to be a firearm; and
>
> (7) That any of these acts occurred in the State of Washington.

Clerk's Papers (CP) at 67. Mr. Nelson objected to the instruction. He also took exception to the trial court's failure to give his requested instructions, as discussed previously.

The trial court also instructed the jury on the definition of a firearm so the jury could answer the special verdict on count 1—whether Mr. Nelson was armed with a firearm when he committed attempted robbery:

> For purposes of the special verdict as to Count One, 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 of Attempted First Degree Robbery. A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP at 83.

The jury found Mr. Nelson guilty of attempted first degree robbery and, by special verdict, found that Mr. Nelson was armed with a firearm when he committed the crime. The jury also found Mr. Nelson guilty of attempting to elude a pursuing police vehicle. In the bifurcated trial, the same jury acquitted Mr. Nelson of first degree unlawful possession of a firearm. This appeal timely followed.

ANALYSIS

1. OMISSION OF ESSENTIAL ELEMENT FROM THE TO-CONVICT INSTRUCTION

Mr. Nelson argues the trial court's to-convict instruction omitted an essential element of robbery in the first degree, and the omission unconstitutionally relieved the State of its burden to prove an element beyond a reasonable doubt. The State responds

that the to-convict instruction was proper; but even if it was improper, any error was harmless.

This court reviews alleged errors of law in jury instructions de novo. *State v. Fehr*, 185 Wn. App. 505, 514, 341 P.3d 363 (2015). A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime. *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). "A to-convict instruction must contain all essential elements of a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence." *Richie*, 191 Wn. App. at 927. "The fact that another instruction contains the missing essential element will not cure the error caused by the element's absence from the to-convict instruction." *Id.* at 927-28.

In *Richie*, a Walgreens employee who had not begun her shift attempted to prevent the defendant from leaving Walgreens without first paying for two bottles of alcohol. *Id.* at 920. As the defendant passed the employee, the defendant hit the employee with one of the bottles over her head and escaped. *Id.* at 920-21. He later was arrested. *Id.* at 921. The State charged the defendant with first degree robbery. *Id.* The trial court instructed the jury on robbery, but the to-convict instruction did not require the State to prove that the victim had an interest in the stolen bottles of alcohol. *Id.* at 928. The *Richie* court held that Washington's common law of robbery makes "clear that a defendant cannot be

convicted of robbery unless the victim has an ownership, representative, or possessory interest in the property taken." *Id.* at 924. Failure to include this essential nonstatutory element in a robbery to-convict instruction unconstitutionally relieves the State of its burden of proving each essential element of the crime beyond a reasonable doubt. *Id.* at 928. The *Richie* court held that the trial court erred because it did not include the nonstatutory essential element.

Here, as in *Richie*, the trial court did not include the essential nonstatutory element in the to-convict robbery instruction. The trial court therefore erred.

2. HARMLESS ERROR BEYOND A REASONABLE DOUBT

"[A]n erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis." *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). "[A]n instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "The *Neder* test for determining the harmlessness of a constitutional error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Thomas*, 150 Wn.2d at 845 (internal quotation marks omitted).

Here, as in *Richie*, the State argued the employee victim had a sufficient representative capacity over the property. "[A] person with a representative capacity would include a bailee, agent, employee, or other representative of the owner *if* he or she has care, custody, control, or management of the property." *Richie*, 191 Wn. App. at 925 (emphasis added). Because of the qualifier in the above language, an employee does not necessarily have representative capacity over all of an employer's property.

Mr. Nelson argues there is no evidence Ms. Meinhold had care, custody, control, or management of the property. He argues Ms. Meinhold did not have access to the oxycodone that was locked in a safe, and Ms. Meinhold had to ask the pharmacist on duty to get the locked oxycodone. The State responds that Ms. Meinhold is a pharmacy technician and, as a pharmacy technician, she had the right to handle oxycodone. But the State failed to offer any evidence that Ms. Meinhold had such a right. The State did not ask Ms. Meinhold to discuss any of her job duties.

The State also argues Mr. Nelson was charged and convicted of *attempted* first degree robbery. The trial court defined the State's burden for proving an anticipatory offense: "A person commits the crime of Attempted First Degree Robbery when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime." CP at 63. A substantial step is an act that is "strongly

corroborative" of the actor's criminal purpose. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006) (citing *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)).

Here, Mr. Nelson, while holding a black pistol at his side, drew Ms. Meinhold's attention to the pistol and threatened to kill her unless she gave him oxycodone in 10 seconds. This act alone is "strongly corroborative" of Mr. Nelson's criminal purpose. Ms. Meinhold said she did not have access to the oxycodone, went to the pharmacist, and asked him to immediately go to the counter. The pharmacist saw Mr. Nelson's note, began to get the oxycodone, paused, and then told Mr. Nelson the store was out of the drug. Had the pharmacist not lied to Mr. Nelson, Mr. Nelson would have obtained the oxycodone because of his armed threat to kill Ms. Meinhold. This evidence allows a jury to reach but one conclusion—Mr. Nelson's armed threat to kill Ms. Meinhold was a substantial step toward committing theft of the oxycodone. We, therefore, conclude that the trial court's instructional error was harmless beyond a reasonable doubt.

3. FIREARM ENHANCEMENT

Mr. Nelson next contends this court should vacate the firearm enhancement. He raises two arguments. He first argues there was insufficient evidence that the gun was operable, as required by RCW 9.41.010(9). He also argues the jury returned inconsistent verdicts: a special verdict finding that he was armed with a firearm when he committed

the crime of attempted first degree robbery; and, later, a not guilty verdict for first degree unlawful possession of a firearm. We disagree with his arguments.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A defendant may raise a challenge to the sufficiency of the evidence for the first time on appeal. *State v. Colquitt*, 133 Wn. App. 789, 795-96, 137 P.3d 892 (2006).

a. *Sufficient circumstantial evidence the gun was operable*

In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-75. This court does not reweigh the evidence and substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d

628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Ms. Meinhold testified the gun appeared to be real. Also, Mr. Nelson directed Ms. Meinhold's attention to the gun he held at his side and threatened he would kill her in 10 seconds unless she gave him oxycodone. Testimony that the gun appeared real, coupled with evidence that the defendant used the gun in committing a crime, is sufficient circumstantial evidence to sustain a jury's finding that the gun was operable. *State v. Tasker*, 193 Wn. App. 575, 594, 373 P.3d 310, *review denied*, 186 Wn.2d 1013, 380 P.3d 496 (2016). Mr. Nelson asks this court to overrule *Tasker*, but fails to explain why the type of circumstantial evidence required by *Tasker* is insufficient. We decline to overrule *Tasker*.

b. *Inconsistent verdicts*

"Where the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count." *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988). As discussed above, sufficient evidence supports the firearm enhancement. We, therefore, will not reverse the inconsistent verdict.

4. LESSER INCLUDED OFFENSE

Mr. Nelson next contends the trial court erred when it denied his request to instruct the jury on the lesser included offense of unlawful display of a firearm.

A defendant is entitled to an instruction on a lesser included offense if two prongs are established. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong is "each of the elements of the lesser offense must be a necessary element of the offense charged." *Id.* The factual prong is the evidence in the case must support an inference that only the lesser crime was committed. *Id.* at 448.

Unlawful display of a firearm is a lesser included offense of attempted first degree robbery. *Id.* Mr. Nelson therefore has met the legal prong of the *Workman* test.

To establish the factual prong, "evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). This court must view the evidence in the light most favorable to the party that requested the instruction. *Id.* at 455-56.

A person is guilty of unlawfully displaying a firearm if the person displays a firearm in a manner that manifests an intent to intimidate another or warranting alarm in another. *See* RCW 9.41.270(1). Mr. Nelson fails to satisfy the factual prong. We

previously held the evidence was insufficient for a trier of fact to find the device was a firearm. Also, there was no affirmative evidence that Mr. Nelson committed unlawful display of a firearm to the exclusion of attempted first degree robbery. Here, the unrefuted evidence is that Mr. Nelson threatened to kill Ms. Meinhold unless she facilitated his theft of oxycodone. For these reasons, we reject Mr. Nelson's argument.

SAG ISSUES

A. JURISDICTION

Mr. Nelson contends that the trial court lacked jurisdiction. Mr. Nelson argues that jurisdiction is lacking because the elected prosecutor did not respond to a written request for information sent by Mr. Nelson. We disagree with Mr. Nelson's argument.

The State establishes trial court jurisdiction by presenting evidence that any or all of the essential elements of the offenses occurred in the state. *State v. L.J.M.*, 129 Wn.2d 386, 392, 918 P.2d 898 (1996); *see also* RCW 9A.04.030(1). This court reviews jurisdictional questions de novo. *State v. Squally*, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997).

Here, the State sufficiently established the crimes took place in Washington. Ms. Meinhold testified she lives in Yakima and was working at the Rite Aid store on Nob Hill Avenue, which is where Mr. Nelson threatened her. Officer Jamie Gonzalez testified he

was working in Yakima when he attempted to question Mr. Nelson, and Mr. Nelson then fled in his Mercedes at a high speed and eluded him. Substantial evidence supports the jury's finding (as set forth in the to-convict instructions) that the crimes occurred in the State of Washington. Because that finding is supported by substantial evidence, we conclude the trial court had jurisdiction.

B. CONFLICT OF INTEREST

Mr. Nelson asserts that his appellate counsel "is a conflict of interest and compelled to lie." SAG at 1. Mr. Nelson makes the same contentions against his trial counsel.

This court considers an issue raised in a SAG only when the SAG adequately informs this court of the nature and occurrence of the alleged error. RAP 10.10(c); *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). This court is not obligated to search the record in support of claims made in the SAG. *State v. Thompson*, 169 Wn. App. 436, 493, 290 P.3d 996 (2012).

Mr. Nelson does not cite to the record to support his arguments. Mr. Nelson, without elaboration, simply asserts counsel are conflicts of interest. Contrary to his assertion, the record establishes that Mr. Nelson was satisfied with trial counsel. Mr. Nelson personally spoke at sentencing in allocution. His first words were, "[f]irst and

foremost, I'd like to thank my attorney, Mr. Dalan, for his time and effort that he put forth on my behalf in this case, his professionalism." RP at 542. Mr. Nelson does not adequately inform this court of the nature and occurrence of his allegations, and we decline to review these alleged errors.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Nelson argues he received ineffective assistance of counsel. Mr. Nelson contends his counsel was ineffective because he "continually coersd [sic] me to waive my 6th Amendment Right." Suppl. SAG at 1. He also asserts his counsel was ineffective for failing to object to the admission of Mr. Nelson's videotaped police interview. We disagree.

1. *Sixth Amendment rights*

Although the Sixth Amendment protects numerous rights, Mr. Nelson appears to refer by argument only to the right to a speedy trial.

CrR 3.3 generally requires the State to bring an in-custody defendant to trial within 60 days of arraignment; if not, the trial court will dismiss the case with prejudice. CrR 3.3(b). The threshold for a constitutional speedy trial violation, however, is higher than that for a violation of CrR 3.3. *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); *see also* U.S. CONST. amend. VI; CONST. art. I, § 22. The constitutional right to a

speedy trial is not violated by passage of a fixed time but instead the expiration of a reasonable time. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). This court reviews de novo an allegation that the constitutional rights to speedy trial have been violated. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). Because some delay is both necessary and inevitable, the appellant bears the burden of demonstrating that the delay between the initial accusation and the trial was unreasonable and created a presumptively prejudicial delay. *Id.* at 283. If this showing is made, this court next considers several nonexclusive factors in order to determine whether the appellant's constitutional speedy trial rights were violated. *Id.* These factors are: the length and reason for the delay, whether the defendant has asserted his right, and the ways in which the delay caused prejudice. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

Here, Mr. Nelson does not surpass the initial showing that the delay was presumptively prejudicial. Although there was a delay of approximately 17 months between arrest and trial, Mr. Nelson was charged with a very serious offense, as well as attempting to elude a police vehicle after an extensive pursuit. He also faced life imprisonment without the possibility of parole, as this was his third serious violent felony. Given the severity of both the charges and the potential sentence, 17 months is a

reasonable amount of time for Mr. Nelson and the State to prepare for trial. Because Mr. Nelson does not meet his burden in showing a presumptively prejudicial delay, this court need not consider the factor test.

2. *Failure to object to videotaped police interview*

Mr. Nelson claims his counsel was ineffective for failing to object to the admission of his videotaped interview with law enforcement.

A criminal defendant has a Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish ineffective assistance of counsel, a defendant must prove the following two-pronged test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). There is a strong presumption

that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). To rebut this presumption, the defendant bears the burden of establishing that no conceivable legitimate tactic exists to explain counsel's performance. *Id.*

Contrary to Mr. Nelson's assertion, his counsel did object to the videotaped interview. The trial court excused the jury and the parties carefully went through the transcript of the police video to identify the portions that were unduly prejudicial to Mr. Nelson. During the discussion, the State and trial court agreed to excise several prejudicial portions of the video that had little probative value. The record shows that Mr. Nelson's counsel carefully assessed the videotaped interview and successfully prevented the jury from viewing several prejudicial portions. Mr. Nelson does not meet his burden in showing that counsel's performance fell below an objective standard of reasonableness in this instance.

APPELLATE COSTS

Mr. Nelson requests that this court deny the State an award of appellate costs in the event the State substantially prevails. Mr. Nelson has complied with our June 2016 "General Order" and has satisfactorily shown he lacks the current or likely future ability to pay appellate costs. We therefore grant his request and deny the State an award of appellate costs.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

I CONCUR:

Fearing, C.J.

PENNELL, J. (concurring) — I concur in the court's decision affirming Edward Nelson's conviction. I also agree that the trial court's instructions did not accurately recount the standard for whether a robbery victim has representative capacity over a piece of property. I write separately because I disagree that this flaw in the instructions went to an essential element of the crime charged.

Unlike *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015), this case does not involve a charge of first degree robbery. Instead, Mr. Nelson was charged with *attempted* first degree robbery. Attempted first degree robbery only has two elements: (1) the defendant intended to commit the crime of robbery, and (2) in furtherance of that intent, the defendant took a substantial step toward the commission of the crime of robbery. RCW 9A.28.020(1); *State v. Kier*, 164 Wn.2d 798, 807, 194 P.3d 212 (2008). Neither of these elements requires the State to prove the victim of the attempted robbery had ownership or representative capacity over the property the defendant intended to steal.

Although a victim's ownership or representative capacity is not an element of attempted robbery, it is a nonstatutory element of robbery. *Richie*, 191 Wn. App. at 924. To adequately instruct a jury on attempted robbery, a court must educate the jury on the definition of robbery. Thus, in an attempted robbery case, the court's instructions must include an instruction accurately outlining the elements of robbery.

Washington's pattern jury instructions suggest two methods for issuing criminal attempt instructions. The most straightforward manner is for the court to issue a

to-convict instruction limited to the essential elements of attempt.[1] A separate instruction can then be provided delineating the elements of the crime that was the object of the attempt. An alternative is to provide an instruction setting forth the definition of attempt, and then drafting the to-convict instruction by "using the word 'attempt' along with the elements of the underlying offense." 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 100.01, cmt. at 432 (4th ed. 2016) (WPIC). When the underlying offense has a complex series of elements (as is true for first degree robbery), this latter approach can be convoluted since a to-convict instruction must contain all elements of the crime charged. *See State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (the to-convict "instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence") (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)).

The trial court here opted for the latter, more convoluted approach. The result was a flawed instruction. As written, the instruction misidentified the requisite nature of the defendant's intent. It should have been specified as intent to commit first degree robbery, not theft of property. In addition, the substantial step portion of the instruction was too narrow and failed to reflect a relationship with the defendant's intent. These errors are in

[1] 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 100.02, at 434 (4th ed. 2016).

addition to the trial court's incorrect substitution of Myung Meinhold's employee status for the requirement of representative capacity, as pointed out by the majority.

Assuming the trial court provided a definition of attempt under WPIC 100.01, an acceptable alternative to the trial court's to-convict instruction would be:

> To convict the defendant of the crime of Attempted First Degree Robbery in Count 1, the following elements must be proved beyond a reasonable doubt:
>
> (1) On or about August 15, 2014, the defendant did an act which was a substantial step towards the commission of First Degree Robbery;
>
> (2) That act was done with intent to commit First Degree Robbery; and
>
> (3) That act occurred in the State of Washington.
>
> The completed crime of First Degree Robbery has the following elements:
>
> (a) The defendant took property from the person or presence of another, Myung B. Meinhold;
>
> (b) Myung B. Meinhold owned, was acting as a representative of the owner of, or was in possession of the property taken;
>
> (c) The defendant intended to commit theft of the property;
>
> (d) The taking was against Myung B. Meinhold's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to Myung B. Meinhold;
>
> (e) Force or fear was used by the defendant to obtain or retain possession of the property;
>
> (f) In the commission of these acts the defendant displayed what appeared to be a firearm or other deadly weapon; and
>
> (g) The acts occurred in the State of Washington.

See 11 WPIC 37.02, at 716-17. In addition, because the State submitted its case under a theory of representative capacity, a separate instruction should have been given defining a representative of an owner as a "bailee, agent, employee or other representative of the

owner if he or she has care, custody, control, or management of the property." *Richie*, 191 Wn. App. at 925. As pointed out by the majority, not all employees have care, custody, or control over an employer's property. Accordingly, defining representative capacity by employment status is inappropriate.

While the trial court's to-convict instruction was legally inaccurate, reversal is unwarranted. The only instructional error raised by Mr. Nelson pertains to the trial court's substitution of Ms. Meinhold's employee status for the requirement of proof of representative capacity. Because this case only involved an attempt, Ms. Meinhold's lack of actual capacity over the property sought by Mr. Nelson had no bearing on the State's case. Impossibility is not a defense to an attempt. RCW 9A.28.020(2). Regardless of whether Ms. Meinhold actually could have obtained the drugs for Mr. Nelson, the State's evidence showed Mr. Nelson thought she could. By demanding drugs from Ms. Meinhold under threat of deadly force, Mr. Nelson evinced an intent to commit the crime of first degree robbery and took a substantial step toward doing so. The trial court's instructional error was harmless.

Pennell, J.

APPENDIX B

FILED
JUNE 6, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 34032-5-III**
	)	
Respondent,	)	
	)	**ORDER DENYING**
v.	)	**MOTION FOR**
	)	**RECONSIDERATION**
EDWARD LEON NELSON,	)	**AND AMENDING**
	)	**OPINION**
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of May 2, 2017, is denied.

IT IS FURTHER ORDERED that the opinion filed on May 2, 2017, shall be amended as follows: Section 4 entitled "Lesser included offense" on pages 14 and 15 shall be deleted and the following shall be inserted in its place:

> 4. LESSER INCLUDED OFFENSE
>
> Mr. Nelson next contends the trial court erred when it denied his request to instruct the jury on the lesser included offense of unlawful display of a firearm.
>
> A defendant is entitled to an instruction on a lesser included offense if two prongs are established. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first prong is the legal prong and requires that

each element of the lesser offense be a necessary element of the offense charged. *Id.* The second prong is the factual prong and requires that the evidence in the case support an inference that only the lesser crime was committed. *Id.* at 448. In addition, the "evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

Mr. Nelson fails to satisfy the factual prong. There was no affirmative evidence that Mr. Nelson committed only unlawful display of a firearm to the exclusion of attempted first degree robbery. Here, the unrefuted evidence is that Mr. Nelson threatened to kill Ms. Meinhold unless she facilitated his theft of oxycodone. For this reason, we reject Mr. Nelson's argument.

PANEL: Judges Lawrence-Berrey, Fearing, and Pennell

FOR THE COURT:

GEORGE FEARING
CHIEF JUDGE

APPENDIX C

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

STATE OF WASHINGTON)
)
Respondent,) No. 340325
)
v.) STATEMENT OF ADDITIONAL
) GROUNDS FOR REVIEW
)
Edward C. Nelson)
(your name))
Appellant)

I, Ed Nelson, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Ineffective Counsel. State appointed attorney's performance was deficient and didn't function as the Counsel guaranteed by the VI Amendment. In fact, My Counsel continually coerced me to waive My 6th Amendment Right, which became a Conflict of interest From the beginning. Transcripts will Reflect Multiple "Contested Continuances" on My Behalf. Barker v. Wingo, 407 U.S. 514 Strickland v. WA ; Also Sreunk v. United States, 412 U.S. 434 Counsel also allowed the State to play MY video taped statement From Police at trial which Prejudiced My defense. Probative value was out weighed by the Prejudice. See Jordon v. Clark, 847 F.2d 1368 (9th Cir. 1988) U.S. Dist. LEXIS 18450

Additional Ground 2

Yakima County Superior Court lacked Jurisdiction. Prosecutor Failed to Answer Memorandum of record administrative Process "Proof of claim" For Joseph Bevsic (Prosecutor). And affidavit of Default Res Judicata. Melo v. U.S., 505 F.2d 1026. The STATE OF WASHINGTON is a Bankrupt corporation. Please see Washington State Const. article. XII, Sect. 1 Also WA. St. Const. Art. VIII Sec. 3, State Debt

If there are additional grounds, a brief summary is attached to this statement.

Date: 8-10-16 Signature: Ed Nelson

BURKHART & BURKHART, PLLC

July 06, 2017 - 2:46 PM

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